No. 650

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IN THE

Supreme Court of the United States

OCTOBER, 1962 TERM.

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

against

LORENZ SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,

Appellees.

IN THE MATTER OF THE ARBITRATION

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ SCHNEIDER CO. INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

KALMAN I. NYEMAN,
Attorney for Appellants,
60 East 42nd Street,
New York 17, N. Y.

December 10, 1962.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Appellants Anthony Chupka, William Freely, William McNally and Charles Schlosser ("appellants") submit

herewith their statement particularly disclosing the basis upon which this Court has jurisdiction to review by appeal the judgment of the Court of Appeals of New York State dismissing appeals from two final judgments of the Supreme Court, Queens County, as affirmed by the Appellate Division, Second Judicial Department, which: (i) in the second above-captioned matter ("the arbitration proceeding") confirms and implements an arbitration award following arbitration between appellees; and (ii) in the first above-captioned matter ("the action") dismisses appellants' complaint in a suit against appellees for an injunction to restrain the enforcement against appellants of the judgment in the proceeding.

The arbitration proceeding and the action were originally separate lawsuits which involve substantially identical questions; they were consolidated on appeal by agreement of the parties, and were considered and determined by the New York Court of Appeals on a single record and in a single opinion.

(a) Reports of the opinions in the courts below.

The opinions of the New York Court of Appeals are reported in 12 NY 2d 1 (adv.), — NE 2d —, and are set forth in full in Appendix A. The arbitration proceeding opinions of the Special Term—not reported—and of the Appellate Division, reported in 14 AD 2d 923, 222 NYS 2d 18, are attached hereto as Appendix B1 and B2. The opinion of the Special Term in the action is reported in 34 Misc 2d 123, 226 NYS 2d 662; the Appellate Division decision affirming, without opinion, the Special Term determination, is reported in 16 AD 2d 938. Copies of the Special Term opinion and the Appellate Division decision are attached hereto as Appendix C1 and C2.

(b) The grounds on which jurisdiction of the Supreme Court of the United States is invoked.

1. This is an appeal from a final order and judgment of the Court of Appeals of New York dismissing appeals from two final judgments of the New York Supreme Court.

The first judgment is dated June 5, 1961 (the "Judgment") and was entered June 7, 1961, in the arbitration proceeding, upon an arbitration award following arbitration between appellees, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802 ("appellee" or "Union"), the adversary party herein, and Lorenz-Schneider Co., Inc., ("Company").

The second judgment is dated July 26, 1962. It was entered on July 27, 1962, in a suit in equity brought by appellants against both appellees for a judgment declaring that appellants are not bound by the Judgment and for an injunction restraining the enforcement against appellants of the Judgment. This judgment grants appellants a decree declaring they are not bound by the Judgment and dismisses their complaint to the extent that it seeks an injunction and other relief.

2. The New York Court of Appeals handed down its decision and opinion on October 25, 1962. Judgments making the Court of Appeals' order and judgment the order and judgment of the Supreme Court were entered in the Supreme Court, Queens County, on November 14 and November 26, 1962. An amended Notice of Appeal to this Court was filed by appellants with the Clerk of the Supreme Court, Queens County, on November 23, 1962.

3. Appellants assert jurisdiction under 28 U. S. C. 1257(2), a grant of jurisdiction on appeal "where is drawn in question the validity of a statute of any state on

the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants challenge the validity of §1462, New York Civil Practice Act, a "statute of a state" within the meaning of 28 U. S. C. §1257(2), on the ground that, as construed and applied to appellants in this case, it: (i) denies them access to the courts for the purpose of asserting rights guaranteed by the Fourteenth Amendment to the United States Constitution; (ii) denies them any redress or remedy against the enforcement of an arbitration award and resulting judgment pronounced without jurisdiction in violation and disregard of the due process requirement of the United States Constitution; (iii) deprives them of their common law remedy against unlawful seizure of their property; (iv) impairs and destroys the validity of their vested contract rights; (v) deprives them of the equal protection of the law; (vi) restrains them from protecting their substantive right; and (vii) otherwise deprives them of the rights, privileges and immunities of the federal laws and the United States Constitution.

The decision of the Court of Appeals of New York, the highest court of the state, was in favor of its validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include *Angel* v. *Bullington*, 330 US 183; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 US 230; *Broderick* v. *Rosner*, 294 US 629; *White* v. *Hart*, 13 Wall 646; *Seaboard Air Line R. Co.* v. *Daniel*, 333 US 118; *W. B. Worthen Co.* v. *Kavanaugh*, 295 US 56; *De Veau* v. *Braisted*, 363 US 144; *Eureka Pipe Line Co.* v. *Hallanan*, 257 US 265, 270; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 US 282.

Since various rights, privileges, and immunities under the Federal Constitution were claimed below, in the event

it should be considered that this appeal was improvidently taken this Court can, and, in view of the public importance of the questions presented, should, it is respectfully submitted, consider this Jurisdictional Statement as a petition for certiorari and grant certiorari, pursuant to 28 U.S.C. §2103.

The following recent decisions are believed to sustain the jurisdiction of this Court for such review: *Raley* v. *Ohio*, 360 US 423; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 US 182, 187; *Pennsylvania* v. *Philadelphia*, 353 US 230.

Appellants contend that the judgment is founded on other errors which, though they involve questions not subject to review by this Court by appeal, nevertheless constituted a denial of due process of law, a violation of the contract impairment clause (Art. 1, §10), a denial of the equal protection clause and a violation of article VI, section 2, of the United States Constitution.

These errors are included in the statement of the questions presented by the appeal, hereinafter set forth. They are included in this appeal under the authority of *Flournoy* v. *Weiner*, 321 US 253, 263, and *Prudential Insurance Co.* v. *Cheek*, 259 US 530, 547."

5. A copy of §1462 New York Civil Practice Act, (the "statute") the statute involved, is attached hereto as Appendix D. It is not officially reported. The first paragraph thereof, which is the pertinent part, reads as follows:

> "§1462. Motion to vacate award. In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:"
>
> . . . . . .

As construed by the New York Court of Appeals and applied in this case, the statute may be invoked only by

parties to the arbitration and no equitable or other relief may be had by a person aggrieved by an arbitration award and resulting judgment which are void for want of jurisdiction, except under the statute, which is the exclusive means of challenging such award and judgment.

(c) The questions presented by the appeal.

1. (a) In an arbitration between a labor union and an employer, can the arbitrator, consistently with the provisions of the United States Constitution, pass upon, adjudicate as to, and make directions affecting the contract rights and property of third persons (former union members and former employees, who had ceased being union members and employees at the date of the submission to arbitration and the subsequent hearings thereon)—not parties to the arbitration or to the agreement providing for arbitration—who have not been summoned to, have had no notice or knowledge of, and did not agree to nor participate in said arbitration? (b) Can a state, consistently with the provisions of the United States Constitution, enter a binding judgment upon such award and in enforcement of such judgment, and, without compensation, oust the persons affected from possession and ownership of property lawfully held by them and direct that such property be seized by others?

2. (a) If the answers to the preceding questions are "No", and the award and judgment mentioned therein are void, can a state, consistently with the provisions of the United States Constitution in relation thereto, deny to the affected strangers access to its courts for the purposes of: (i) presentation and consideration of a claim of a denial of Federal rights; (ii) a judicial review of and relief from the enforcement of said award and judgment; and (iii) a hear-

ing on the substantive issue affecting their contract rights and property in advance of the destruction of their contract and seizure of their property? (b) Is not a state statute (Sec. 1462 N. Y. Civil Practice Act) which, as construed and applied by the highest court of New York, denies the affected third person strangers access to the courts for the purposes and under the conditions described herein, and deprives them of any remedy for the protection of their rights and property, repugnant to the Fourteenth Amendment to the United States Constitution?

3. Can a state, consistently with the provisions of the United States Constitution, coerce the seizure of private property and the destruction of contract rights by a decree of specific performance where such seizure and destruction are a tort and a crime under the laws of the State of New York and violate another decree of the same court which mandates such seizure and destruction?

4. Are the grant of power by Congress to, and the exercise of such power by, a labor union, under the National Labor Relations Act, 29 U. S. C. A. §151-166, 9 FCA, Title 29, §151-166, subject to the restraints of the Fifth and Fourteenth Amendment to, and the guaranties of personal, civil and political rights of, the United States Constitution? If not, would not such National Labor Relations Act be unconstitutional?

5. Can a labor union which, in an arbitration with an employer wherein it challenged previously concluded sales transactions between employer and certain former employees and former union members as having been in contravention of a labor agreement and sought to invalidate such sale transactions, be thereafter deemed the agents at such arbitration of the former union members and former employees notwithstanding conflicting interests between the

labor union and its former members and the labor union disavowed agency and succeeded at arbitration on a theory inconsistent with such agency?

6. Assuming *arguendo*, the labor union assumed to act as agent for its former members in the arbitration described in the preceding question, did such labor union, under the circumstances of this case, infringe such former members' rights and deprive them of their property without due process of law, in violation of the guaranties of the Fifth and Fourteenth Amendment to the United States Constitution and impose upon them economic servitude inconsistent with the Thirteenth Amendment to the United States Constitution?

7. Can the highest court of a state deny litigants the protection of Federal rights on a theory based on a construction of the National Labor Relations Act inconsistent with the basis on which the opposing party prevailed at arbitration, which theory was first advanced by the court, never urged nor adopted by the successful party nor ever litigated by any of the parties and is without support in the record? Is not such action of the court a denial of due process?

(d) The material facts of the case.

There are no disputed fact issues involved in this appeal, the parties having agreed (261)[1] that only issues of law are presented.

1. The controversy.

In May (as to three appellants) and August 1960 (as to the fourth appellant) appellants purchased (the "sale transactions") from appellee Lorenz-Schneider Co., Inc. (the "Company") the sales routes, including the physical assets and franchises, each had previously serviced as an

[1] Numbers in parentheses refer to the folios of the printed record on appeal, unless otherwise indicated.

employee of Company. The routes thus sold numbered four of a total of sixty then owned by Company.

The routes were sold upon the initiative and insistence of appellants who were previously offered routes for sale by a competitor of Company, but had expressed a preference to buy such routes from Company, if they could. The practice of selling routes has prevailed in the industry for upwards of twenty-five years.

The sale transactions were accomplished by separate written contracts for a valuable consideration[2] in each case. The bona fides of the sale transactions and good faith of the parties thereto have never been questioned.

After the sale transactions were concluded, appellee International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802 ("Union" or "appellee"), which had a collective bargaining agreement (the "labor contract") with Company dated October 5, 1959, notified Company it considered that the sale transactions had violated the labor contract and demanded of Company arbitration of that issue. Union had never before challenged the practice of selling routes nor Company's right to do so (326). Union and Company thereupon selected an arbitrator and agreed to submit for decision the issue:

> "Were the Company's sales of routes to William Frieley, Anthony Chirpka (sic), William McNally and Charles Schlosser [appellants] in violation of the contract between the parties? If so, what shall be the remedy?"

Hearings before the arbitrator were thereafter held beginning September 16, 1960 and ending February 1, 1961.

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[2] The total aggregate consideration was $66,072.00. Appellants made an aggregate cash down-payment of $19,460.00, on the signing of the contracts (360, 405, 448, 495) and agreed, in addition, to make, what the arbitrator termed "substantial" (584) payments.

Appellants were not present or represented, received no notice of the arbitration or of the hearings had no knowledge thereof (339, 382, 424, 471) did not select the arbitrator or enter into any submission agreement and first learned of the arbitration after the decision and award were rendered (505).

2. The arbitration decision and award.

The arbitrator found that the sale transactions were made for "business reasons" (579);[3] that the changed relationship resulting from the sale transactions is more beneficial to appellants (582); that Company and appellants are content with the new status and there is no grievance by any of the appellants; that Union itself, by reason "of its own direct interest in the maintenance of the agreement" is the only interested party protesting the change in status (582).

The arbitrator found also that appellants '[m]embership in a labor organization or representation by a labor organization cannot be considered as creating a disability by which the member employees lose any part of their freedom to contract a change in their status from employee to entrepreneur" (587).

The arbitrator held that a clause of the labor contract[4] which permits Company to make any agreement with its

[3] The record discloses that the business reason which impelled the sale is that Company was faced with the alternatives of losing appellants' services (and with them the routes) to competitors who offered to sell routes to appellants, or of selling its own routes to appellants and retaining, at least, an outlet for the sale of its products (329, 421, 436, 378, 468).

[4] Article 17(a) which reads: "It is further agreed by the Employer that he will not enter into any agreement with any employee, verbal or in writing, which may be inconsistent or in conflict with this agreement, except that the Employer may add to benefits or earnings as circumstances warrant." (594).

employees which may add to their benefits or earnings, did not authorize the sale transactions because appellants ceased, *eo instante* the sale transactions were concluded, to be *employees* (579, 585, 594), and therefore that they are *not* covered by the language of 17(a) any more than by any other language of the agreement (594), and concluded that the sale transactions were in violation of the labor contract and "* * * the most reasonable remedy is a restoration of the routes to the coverage of the agreement." (600).

3. The court proceeding in enforcement of the arbitration award (the arbitration proceeding).

Following the arbitration award (the "award") a motion and cross-motion were made by Company and Union to vacate and confirm, respectively, the award. Company challenged the correctness of the arbitrator's decision on the various grounds set forth in 1462, Civil Practice Act. Appellants' affidavits challenged the jurisdiction of the arbitrator to adjudicate concerning or affect their rights or property and asserted that in so doing the arbitrator violated constitutional due process by depriving them of their property without a hearing (342-3, 386, 428, 475), and supported the motion to vacate the award.

The court at special term noted appellants' contention that the arbitrator "violated due process by attempting to deprive petitioners of property without a hearing." (675); that "the arbitrator adjudged the rights and equities of [appellants] * * * without so much as giving them a hearing * * *." (680) but overruled the same because (i) "* * * an arbitrator can direct specific performance if it is necessary to accomplish the complete disposition of the dispute submitted to arbitration * * *"; (ii) "In no other way could the union be made whole. * * *"; (iii) "[Company] cannot be allowed to perpetuate a breach it has committed under

the guise of protecting alleged contractural rights of individuals to whom it transferred the routes."; and (iv) "the * * * award did not affect any recourse [appellants] may have against [Company] based on their contracts with it. It cannot be said, therefore, that the arbitrator was guilty of 'misbehavior' because of so-called 'constitutional' or 'jurisdictional' dereliction (see Matter of Otis Elevator Co. [Carney], 6 N. Y. 2d 358)." (685).[5]

Judgment was thereupon entered (the Judgment) directing *inter alia*:

> "ADJUDGED AND DECREED that the routes transferred to [appellants], shall be returned to the coverage of the aforesaid collective bargaining agreement between [Union and Company] to be served by route salesmen within the scope of Article 1(a) of the said collective bargaining agreement, and that [Company] take managerial control of the bakery sales routes which it transferred to [appellants], and that [Company] run such routes with its own employees protected by the said collective bargaining agreement, * * *" (313).

An appeal from the Judgment was taken by Company and appellants to the Appellate Division of the Supreme Court, Second Department. Company challenged the correctness of the decision and award on the different grounds specified in the statute. Appellants contended the Judgment adjudicated their property rights and deprived them of their property without due process of law in violation of their rights under the United States Constitution. (195).

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[5] The case cited by the special term deals solely with the question whether a dispute over the *bona-fides* of an alleged sub-contracting of janitorial services is arbitrable or not; its relevancy to the point made by the court or the facts of this case does not appear.

Union conceded in the Appellate Division that the arbitrator lacked jurisdiction to make a binding adjudication as to appellants (202), and acknowledged that no citation of cases is necessary to emphasize the "sanctity of [the] principle * * * that every person is entitled to a 'day in court' before his rights may be affected" (203) but argued that appellants had no standing to challenge the Judgment because: (i) appellants were not parties to the arbitration and did not participate therein; that under §1462 Civil Practice Act, as construed by the New York Court of Appeals in *Matter of Soto*, 7 NY 2d 397 ("*Soto*") only parties to an arbitration had standing to challenge an arbitration award; (ii) none of the appellants' rights were adjudicated by the award or the Judgment; and (iii) the award does not affect appellants' property. (197).

The Appellate Division affirmed the Judgment and, as to appellants, held:

> "The individual petitioners, [appellants] former employees who purchased the routes, were not parties to the collective bargaining agreement and had not participated in the proceedings before the arbitrator. Not being parties to the arbitration or to the agreement upon which it was held, such individual petitioners have nostanding to move to vacate the award (Matter of Soto (Goldman), 7 N. Y. 2d 397; Matter of Romanoff (Nilom Realty Corp'n) 273 App. Div. 788). Hence, we do not pass upon the questions urged solely in their behalf." (717).

As related *infra*, Company's application for leave to appeal to the New York Court of Appeals was denied and appellants' ultimate appeals as of right to that court from the Judgment and from a judgment in a subsequent plenary suit brought by appellants against appellees were dis-

missed by that Court on the ground " * * * they present no substantial Constitutional question" (see appendix A).

4. Appellants' plenary suit for declaratory and injunctive relief.

Following the Appellate Division's decision, quoted above, appellants instituted a suit in equity for a judgment declaring that the award and the Judgment were void as to and not binding upon appellants and for an injunction restraining appellees, who were named as defendants, from enforcing the award or the Judgment against appellants or from taking over or otherwise interfering with appellants' routes (108-111).

The action is grounded on the contention that the Judgment deprives appellants of their property without due process of law in contravention of the provisions of the United States Constitution (104).

In that action, Union, the adversary party, expressly acknowledged that neither the award nor the Judgment is binding upon appellants *and that the Judgment is not enforceable against appellants.* Thus, in opposition to appellants' motion for a temporary injunction (which was denied), Union's counsel said:

> "6. The Union does not dispute that the individual plaintiffs herein [appellants] are no longer Lorenz-Schneider employees, nor does the Union dispute that they were not parties to the arbitration, and thus, that the Arbitration Award does not bind them personally. For this reason, the Union argues, as it has argued at every stage of these proceedings, that the rights of these individuals were affected neither by the award nor by the judgment entered confirming said award." (129)

At the same time, Union expressly acknowledged that as a necessary result of appellants' not having been parties

to the arbitration the Judgment is not enforceable against them. Thus:

> "* * * In the affidavit of Kalman J. Nulman, sworn to February 6, 1962 and submitted on this application, it is stated that because the Appellate Division decided that plaintiffs [appellants] herein were not properly parties to the Companion Action, [the arbitration proceeding] plaintiffs' right to enjoin the enforcement of this judgment against them is established beyond any doubt as a matter of law since it follows that if the judgment is not binding upon these plaintiffs, [appellants] it may not be enforced against them."
>
> "6. The fallacy in Mr. Nulman's reasoning is apparent. No attempt has been made to enforce the judgment in the Companion Action [the Judgment] upon any party except the one to whom it is addressed, namely Lorenz-Schneider Co., Inc., the employer.[6] Nor is that judgment enforceable against plaintiffs [appellants] herein." (161-162).

Following the denial of appellants' motion for a temporary injunction, Union applied for summary judgment dismissing appellants' complaint. Union based its motion on the contentions: (i) that the Judgment "is addressed only to the Employer and does not affect the rights of [appellants]" (177); hence appellants are not entitled to restrain the enforcement against them of the Judgment; (ii) Union would be seriously prejudiced if it could not enforce the Judgment against appellants; (iii) "A judgment duly entered and enforced may not be collaterally attacked"

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[6] Union has obtained an order (33,277) which adjudges Company in contempt for its failure to seize appellants' routes as mandated by the Judgment and provides that in the event of noncompliance an order of commitment of Company's officers shall issue. Appellants were granted a stay of the enforcement of this order—which extended an earlier stay granted by a judge of the Court of Appeals—by Mr. Justice Harlan on November 30, 1962, which stay is presently in effect. (See Appendix F1, F2).

(177); appellants' suit "is an especially flagrant case of impermissible collateral attack since this action has for its sole purpose an attempt to invalidate a judgment which was held, by an unanimous opinion of the Appellate Division, to be valid and enforceable" (178); (iv) "* * * every argument which [appellants] now raise in support of this action to prevent enforcement of the judgment was heard and rejected by this Court, and by the Appellate Division in the prior proceeding" and (v) "any rights which [appellants] may have will be adequately protected by an action against the Employer for damages if * * * Employer elects to comply with that judgment in a manner which violates plaintiffs' rights." (177-178). An additional ground,—that §1462 N. Y. Civil Practice Act is the exclusive remedy for vacating an arbitration award—was raised for the first time in the Court of Appeals.

Appellants cross-moved for summary judgment in their favor as prayed in the complaint.

The special term justice noted appellants constitutional contention (269) and that no claim is made that appellants acted in bad faith (270) and said:

> "It is true that since [appellants] were not properly before the Court in the proceedings which resulted in [the Judgment], that judgment is not *res judicata* with respect to their rights to the routes * * *. Nevertheless, this Court is constrained to hold that the equities do not warrant injunctive relief in [appellants'] favor, the practical effect of which would not only frustrate the unanimously affirmed judgment, but nullify it. * * *" (269)

Judgment was thereupon directed declaring that appellants are not bound by the Judgment and dismissing appellants' complaint to the extent that it seeks an injunction and other relief.

Appeals were thereafter taken to the Appellate Division on a consolidated record, by appellants, from (i) the judgment dismissing their complaint and (ii) from the order denying their motion for a temporary injuction, and by Company, from the order granting Union's motion to punish it for contempt. Appellants specifically contended that the refusal to grant them the only effective remedy available for the protection of their rights and property violated constitutional due process. That court unanimously and without opinion affirmed the judgment and determinations appealed from (718).

Appellants thereupon appealed to the Court of Appeals as of right from the Judgment and the judgment of dismissal upon the ground the appeals directly involved the construction of the Constitution of the United States New York Civil Practice Act, Sec. 588 (1)(a); New York Constitution, Art. VI, Sec. 7, subd. (1). See *Valz v. Sheepshead Bay Bungalow Corp.*, 249 NY 132, 163 NE 124, cert. den. 278 US 647.

Prior to argument, appellants moved in that court for a stay, pending appeal, a certificate that constitutional questions are involved in the two appeals and for other relief. Union cross-moved for a dismissal of the appeals.

On September 24, 1962, the appeals were argued in the Court of Appeals. Upon the argument, Union renewed its motion for a dismissal. On October 25, 1962, the Court of Appeals rendered its decision and opinion, one judge dissenting and one judge not participating, dismissing the appeals and denying appellants' motion. From the order and judgment of the Court of Appeals, appellants appeal to this Court.

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[7] Prior to the argument of these appeals, Company sought and was denied leave to appeal to the Court of Appeals from the Judgment.

5. The manner in which the federal questions were raised and passed upon by the state courts.

Appellants affidavits opposing confirmation of the arbitration decision and award specifically challenged the arbitrator's jurisdiction on constitutional grounds (342, 386, 428, 476). The arbitration justice noted (675) and rejected these contentions (684). Appellants' appeal to the Appellate Division from the Judgment was on constitutional grounds. Appellee's answering brief noted and replied (203) to such contention. The Appellate Division declined to pass upon these questions on the ground that appellants lacked standing in the arbitration proceeding to challenge the award (717).

Appellants complaint (97-111) in the action is grounded on the constitutional question (104). The summary judgment justice noted (269) appellants contention and disposed of the same as noted at page 16, *supra*.

In the Court of Appeals, appellants raised the federal questions by a motion, prior to the argument and consideration of the appeals, as follows:

"The Constitutional Questions."

"12. Appellants contend they are being deprived of their property under a judgment entered in a proceeding to which they were not parties, in violation of their constitutional rights.

They contend that, if, as the decision law of this State appears to hold, §1462 Civil Practice Act is the exclusive remedy for challenging the entry of an unauthorized judgment on an award by an arbitrator who has no jurisdiction over the person whose property rights are adjudicated and affected, then such statute is repugnant to the Fourteenth Amendment of the United States Constitution because such statute is held to be unavailable to appellants for the very reason that the judgment is unauthorized.

> Appellants contend further that the action of the court in refusing appellants the only effective remedy for the protection of their property rights deprives them of their property unlawfully and is likewise repugnant to the Fourteenth Amendment of the United States Constitution.
>
> Appellants have asserted these constitutional questions from the very outset of their advent into this controversy. Thus, in affidavits filed before the Special Term Justice on the motion to confirm or vacate the award, appellants raised the constitutional question (58A, 98A, 140A, 187A)*. The Special Term Justice before whom the award was presented for confirmation took note of appellants' contention (398A).
>
> This contention was urged on appeal to the Appellate Division and was noted by Union in its answering brief (213). Appellants' complaint in the plenary action is specifically grounded on this contention (108) and appellants' brief (copy of which is submitted herewith) urges this contention as the principal ground for reversal.
>
> These constitutional questions if decided favorably to appellants are dispositive of these appeals and for that reason appellants contend they are entitled to appeal to this Court as of right."

Appellants' contentions were also spelled out and argued in detail in the briefs filed with the state courts and in oral argument.

The fact that the federal questions were adequately and properly raised was recognized by the state courts in their opinions. The majority of the Court of Appeals believed itself bound by its prior decision in *Soto* and on that ground held that no substantial constitutional question is involved in this appeal, while the dissenting judge specifically adopts

the position that a constitutional question is clearly presented which requires a reversal of the judgment.

This Court will accept the recognition by the state court that the federal questions were properly raised in that court. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 US 182, 185. See *Raley* v. *State of Ohio*, 360 US 423; *Whitfield* v. *State of Ohio*, 297 US 431.

(e) The federal questions are substantial.

1. The statute is arbitrary and unreasonable and beyond the power of the state to enact; it permits the taking of private property without compensation and abrogates private contracts for no public purpose, contrary to the Due Process Clause of the Fourteenth Amendment and the Contract Clause (Art. 1, Sec. 10) of the Constitution of the United States.

The right of access to the courts is assured by article VI, section 2 of the United States Constitution. The power of a state to deny access to its courts, in the exercise of its right to regulate practice and procedure, is subject to the restraints imposed by the due process, contract, and privileges and immunities clauses of the Federal Constitution. *Angel* v. *Bullington* 330 US 183; *McKnett* v. *St. Louis & S. F. R. Co.*, 292 US 230; *Twining* v. *New Jersey* 211 US 78, 100; *West* v. *Louisiana*, 194 US 258, 263.

A state may not take private property without compensation from one person and award it to another, in enforcement of a judgment entered in a proceeding *ex parte* to the person prejudicially affected. Nor may a state abrogate a private contract for a non-public purpose in enforcement of any such judgment.

Appellee has acknowledged that no citation of cases is necessary to support the "sanctity of [the] principle . . .

that every person is entitled to a 'day in court' before his rights may be affected" (203).

Yet, the practical operation and effect—indeed the effect intended by the state courts—of the judgments appealed from is to rescind appellants' contracts, take their property from them without compensation, transfer such property to another, and destroy appellants' contract rights, all pursuant to a judgment entered upon an award rendered by an arbitrator who, it is conceded, had no jurisdiction over appellants, which judgment, it is conceded and has been adjudged, is not binding upon appellants and which appellee concedes may not be enforced against appellants.

By denying appellants access to the courts to assert rights guaranteed to them by the United States Constitution and to obtain the remedies provided for the preservation of such rights, the state has assumed to exercise indirectly powers which it does not possess. *Wayman* v. *Southard*, 10 Wheat. 1; *Bailey* v. *Alabama*, 219 U. S. 219, 244.

Under New York law, a person aggrieved by a judgment entered by a court acting without jurisdiction has always had the right to obtain direct and summary relief. *Kamp* v. *Kamp*, 59 NY 212; *Brookley* v. *Ives*, 243 App Div 487; 278 NYS 147.

It has always been thought that the right of access to the courts for the determination of the issue of the jurisdiction of a tribunal assuming to affect the rights or property of a person is essential to the constitutionality of any state enactment providing for the establishment of an administrative or quasi judicial body. The constitutionality of the New York Arbitration Law was upheld precisely because it assured such right of review and that the court's doors would be open for whatever measure of relief the courts may exact. *Finsilver, Still & Moss* v. *Goldberg M.*

& Co., 253 NY 382, 171 NE 579, 69 ALR 809; *Matter of Berkowitz* v. *Arbib & Houlberg*, 230 NY 261, 130 NE 288; *National City Bank* v. *Waggoner*, 230 App Div 88, 243 NYS 299, aff 255 NY 527, 175 NE 298; *Schafran & F. Inc.* v. *Lowenstein*, 280 NY 164, 171, 19 NE 2d 1005.

In *Finsilver, supra*, the New York Court of Appeals said (p. 389):

> "Arbitration supposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award is assured by the Constitution as part of its assurance of due process of law."

Under the statute, as construed in *Soto* and applied to this case, appellants are not only deprived of any right to challenge the jurisdiction of the irregular tribunal, but are deprived of all other remedies by the holding that ". . . the statutory remedy for an attack upon a statutory arbitration award is exclusive and . . . a plenary suit in equity will not lie for that purpose (Civ. Prac. Act, §1462; *Raven Elec. Co.* v. *Linzer*, 302 N. Y. 188; *Feinberg* v. *Barry Equity Corp.*, 302 N. Y. 676; *Estro Chem. Co.* v. *Falk*, 303 N. Y. 83)." *Donato* v. *American Locomotive Co.*, 283 App Div 410, 413, 127 NYS 2d 709, aff 306 NY 966, 120 NE 2d 227.[8]

[8] The Appellate Division noted that there was a conflict between the "older view" that the union has the sole right to bring and control arbitration proceedings under collective bargaining agreements and the more recent view that the individual employee has enforcible rights of his own under a collective bargaining agreement, and that "the law on the subject is still in a state of flux". However, for reasons which will appear, *infra*, we do not believe this question is an issue in this case.

It should be noted that by the express terms of the statute, parties to an arbitration may have an award vacated for a variety of reasons, including the absence of a valid submission or contract[5] [for arbitration]. Appellants on the other hand, who have entered into neither an arbitration agreement nor submission agreement may not challenge the award simply because they were not given notice of the hearing and an opportunity to be heard and were not made parties to the arbitration.

No requirement of public policy has been suggested to sustain this palpably arbitrary discrimination against persons, not parties, affected by the award of an irregular tribunal acting without jurisdiction.

The Judgment mandates assumption by Company of control of appellants' property in disregard of the established law that specific performance will not be decreed if the performance sought is in violation of the rights of a third person, or is tortious or criminal. Restatement, Law of Contracts, §368; subdivision 5, section 580, New York Penal Law; *Cohen v. A. E. A. Realty Corp.*, 250 NY 262, 165 NE 285.

It is clear that the Judgment is an assertion of judicial power to bind appellants' property for the obligations which the judgment purports to establish—a power the Court did not possess. *Griffin* v. *Griffin*, 327 US 220, 228.

For whatever else may be uncertain about the definition of the term "due process of law," this Court has made it clear beyond doubt that it inhibits the taking of one man's

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[5] §1462 provides: ". . . the court must make an order vacating the award, upon the application of any party to the controversy . . .

"5. If there was no valid submission or contract . . ."

property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing. *Ocha* v. *Hernandez y Morales*, 230 US 139; *Hagar* v. *Reclamation Dist. No. 108*, 111 US 701, 708; *Iron Cliffs Co.* v. *Negaunee Iron Co.* 197 US 463.

The state court has not only acted, in violation of appellants' constitutional rights, by subjecting appellants' property to seizure under a judgment which, by its own decree, has been declared not binding upon appellants, but has exercised its coercive power of contempt to help effect such seizure and thereby thwart its own solemn decree.

In addition, by refusing appellants access to its courts, the state has nullified, abrogated and rescinded appellants' contracts with Company in disregard of appellants' constitutional rights.

Appellants' contracts were fully executed and the sale transactions had been concluded prior to appellee's intervention. A contract obligation had, therefore, arisen and appellants' right to enforce these contracts had become vested, and came within the protection of both the contract impairment clause in Art. 1 § 10 and the due process of law clause in the 14th amendment of the federal constitution. *Coombs* v. *Getz*, 285 US 434; *McCracken* v. *Hayward*, 2 How. 608, 612. It is, therefore not competent for the state to impair those rights by refusing appellants the means for their enforcement. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 554; *Osborn* v. *Nicholson*, 80 US 654; *White* v. *Hart*, 13 Wall 646; *Lynch* v. *United States*, 252 US 571.

It is no remedy to appellants that they may acquiesce in the wrongful seizure of their property and destruction of their rights and resort, as the Court of Appeals suggested to "... their remedy, if any; . . . by way of a suit"

for damages against [Company] which had illegally attempted to sell them the routes". (appendix A). *Poindexter v. Greenhow*, 114 US 270.

As this Court said in *Consolidated Edison Co. v. Labor Board*, 305 US 197, 235, appellants, having valuable and beneficial rights in their contracts, were entitled to notice and a hearing before they could be set aside.

2. The *Soto* doctrine is in conflict with the intent of Congress as expressed by the explicit language of the National Labor Relations Act and the federal decisions construing the Act; even if correct *Soto* is inapplicable to the facts of this case.

The New York Court of Appeals held that appellants' contentions raise no substantial constitutional issue because it believed itself concluded by its prior decision in *Soto*.

Soto results from a construction of the National Labor Relations Act (29 U. S. C. 159(a)) which does violence to the language of the Act, and is in conflict with the interpretation thereof by the federal courts and which, if correct, could very well render the Act unconstitutional.

We shall not here discuss the very complex questions involved but will confine ourselves to an outline of the reasons for our conclusion and an explanation for our assertion that *Soto* has no bearing on this case.

(i) It is apparent from the majority opinion that the court believes that a labor union possesses plenary powers over its members. This appears to be contrary to this Court's holdings in *Steele v. Louisville & Nashville Railroad Company*, 323 US 192, and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 US 210.

(ii) The Court's assertion that "as union member beneficiaries of a collective bargaining agreement [appellants] have disabled themselves from asserting

in the courts any right to litigate any controversy between the employer and the employees represented by the Union" is at the same time too broad and not broad enough and is based on certain erroneous assumptions:

(a) Appellants never claimed to be entitled to participate in *any* controversy between the employer and the employees represented by the Union; they expressly repudiated such intention.[19]

(b) The Court does not go so far as to say (and appellee has never so contended) that once appellants became union members they forfeited their right to leave their employment. Yet if the Court's expression falls short of this, the entire structure of its decision collapses, for if appellants had the right to leave their employment and surrender their union membership, it follows that they had the right to engage in any lawful business or occupation they desired and purchase, for the purpose, any property they required—which they did. As an incident to their right to acquire and own property, they have the right to retain the same subject to being divested only in accordance with modes and procedures guaranteed by the due process clause of the United States Constitution.

(c) Implicit in the Court's decision is the idea of a constructive agency, that is, that appellants were represented at arbitration by appellee Union. Apart from the grotesque notion of an agency under the

[19] In their brief in the Court of Appeals, appellants said: "This is not to say that appellants are indispensable parties to *any* controversy between Employer and respondent [Union]. These parties could, without the presence of appellants, have arbitrated or litigated the question whether Employer had breached its agreement with respondent in selling its routes to appellants. It is only when the arbitrator, and subsequently the court enforcing the award, reached out to adjudicate the title of these appellants and directed specific performance (398) mandating the taking of their property, that appellants became indispensable parties to the controversy."

circumstances here involved—vigorously discussed in the carefully reasoned dissenting opinion (see also *S. J. Piercy* v. *Louisville & Nashville Railway Company*, 198 Ky. 477, 248 SW 1042, 33 ALR 322—the Court considered it of no consequence that appellants had ceased being employees and union members at the date they concluded the sale transactions, many months earlier, and overlooked the facts: (i) appellee Union never assumed to act as agent for appellants; on the contrary it expressly disavowed such agency and succeeded at arbitration precisely because appellants had, as the arbitrator held, ceased to be employees and union members *eo instante* the sale transactions were concluded; (ii) the issue of agency is not present in this case because appellee Union (which never at any time in this litigation—not even after the suggestion appeared during the oral argument of this appeal—made or adopted the suggestion that it was acting as appellants' agent) would have been estopped, under familiar principles of law[11] from asserting the inconsistent claim of agency after having prevailed at arbitration on a contrary theory; and (iii) the various assumptions made by the Court as to the nature of the controversy, possible defenses, etc. are themselves issues on which appellants are entitled to be heard.

The Court's construction of the National Labor Relations Act raises arguable questions of extensive scope. We have preserved these questions in our notice of appeal (Questions 5, 6 and 7) and are prepared to brief them and shall do so if need should arise. We are bound to say, however, that these issues are not properly in this case and will not be unless appellee adopts in this Court the contention, never previously made, that it acted as agent for appellants at arbitration. Unless appellee makes such contention, *Soto*

[11] *Freeman on Judgments*, § 531; *Missouri* v. *Chicago, B. & Q. R. Co.*, 241 US 533; *Davis* v. *Cornwall*, 68 Fed 522, 525, 15 CCA 559.

which is inapplicable for other reasons as well, can have no application. Since this agency theory has never been asserted or litigated our discussion of the subject must necessarily await appellee's contentions. Cf. *Saunders v. Shaw*, 244 US 317.

Conclusion.

Appellants respectfully submit that this appeal brings before this Court federal questions under the Constitution that are far-reaching and important, both in terms of legal principles and of practical impact upon millions of union members; and that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

New York City, December 10, 1962.

Respectfully submitted,

KALMAN I. NULMAN,
Attorney for Appellants.

APPENDIX A.

Opinion of the New York Court of Appeals.

(12 N. Y. 2d 1)

CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

Commencing October 25, 1962.

ANTHONY CHUPKA, *et al.*, Appellants, *v.* LORENZ-SCHNEIDER CO., INC., Defendant, and JOHN STRAUSS, as President of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802, Respondent.

In the Matter of the Arbitration between WILLIAM FIKELY *et al.*, Appellants, *et al.*, Petitioners, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, LOCAL 802, Respondent.

Argued September 24, 1962; decided October 25, 1962.

Appeal—constitutional questions—arbitration—appeals, on alleged constitutional grounds, from determination that award in arbitration, holding that employer's sale of routes to "route salesmen" was in violation of collective bargaining agreement, was valid and that said salesmen, purchasers of routes, were without standing in proceeding to vacate said award since they were not parties to arbitration, and from dismissal of complaint in action for declaratory judgment, dismissed—no substantial constitutional question presented—route salesmen not deprived of property rights without due process of law.

1. An employer of "route salesmen" which had entered into a collective bargaining agreement with a labor union covering such employment sold some of the routes to four of the route salesmen

under agreements reciting that they were no longer to be employees but would be independent contractors. In an arbitration proceeding held pursuant to an agreement to arbitrate in the collective bargaining agreement, the arbitrator held that the sale of the routes was in violation of the agreement. The four route salesmen joined the employer in a proceeding to vacate the award, and the Appellate Division unanimously affirmed an order of Special Term holding that the arbitration award was valid as to the employer and that the route salesmen were without standing in the proceeding since they were not parties to the arbitration. The Appellate Division also unanimously affirmed the judgment dismissing the complaint in an action for a declaratory judgment. Appeals taken in the action and the proceeding on alleged constitutional grounds are dismissed. No substantial constitutional question is presented.

2. Where a union and an employer have an arbitrable controversy under a collective bargaining agreement, an arbitration award may be vacated only at the instance of one of those two parties and not by an individual employee.

3. The route salesmen are not being deprived of property rights without due process of law. As union member beneficiaries of a collective bargaining agreement, they have disabled themselves from asserting in the courts any right to litigate any controversy between the employer and the employees represented by the union. Any agreement which they attempted to make with their employer relating to the matters covered by the collective bargaining agreement was necessarily subject to the collective bargaining agreement itself.

Chupka v. *Lorenz-Schneider Co.*, 16 A D 2d 938, appeal dismissed.

Matter of Freely (Int. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 802), 14 A D 2d 923, appeal dismissed.

APPEALS, on alleged constitutional grounds, (1) in the above-entitled action, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 27, 1962, unanimously affirming (a) an order of the Supreme Court at Special Term (WILLIAM B. GROAT, J.), entered in Queens County, which

denied a motion by plaintiffs for a temporary injunction against defendants' interference with plaintiffs' management, operation and control of certain sales routes, and (b) an order of said court at Special Term (LESTER A. HOLTZMAN, J.; opinion 34 Misc 2d 123), entered in said county, which granted in part and denied in part a motion by defendants and a cross motion by plaintiffs for summary judgment, to the extent of dismissing so much of the complaint as sought injunctive relief, with leave to plaintiffs to serve an amended complaint to recover damages against the corporate defendant, and of declaring that plaintiffs were not bound by a judgment entered June 5, 1961 in the above-entitled arbitration proceeding, (2) in said proceeding from a judgment of said Appellate Division, entered January 11, 1962, unanimously affirming (a) an order of the Supreme Court at Special Term (CHARLES MARGETT, J.), entered in said county, which granted a motion by respondent to confirm the award of an arbitrator, denied a motion by petitioners to vacate such award, and directed the corporate petitioner to resume managerial control of the sales routes previously transferred to the individual petitioners, and (b) the judgment entered on such order.

POINTS OF COUNSEL.

KALMAN I. NULMAN for appellants. I. The court's refusal to relieve appellants from the effects of a judgment which mandates the seizure of their property, although founded upon the award of an arbitrator who lacked jurisdiction, violates constitutional due process. (*Pennoyer* v. *Neff*, 95 U. S. 714; *Simon* v. *Southern Ry.*, 236 U. S. 115; *Grannis* v. *Ordean*, 234 U. S. 385; *Matter of Killan*, 172 N. Y. 547; *Halstead* v. *Striker*, 144 N. Y. 705.) II. The statute was never intended to bar a stranger affected by an arbitration award made in disregard of his constitutional rights from obtaining relief therefrom; otherwise, it would be repug-

nant to the Constitution. (*Bennett v. Wilson*, 122 Cal. 509; *Matter of Killan*, 172 N. Y. 547; *Matter of Doey v. Howland Co.*, 224 N. Y. 30; *Marty v. Marty*, 66 App. Div. 527.) III. *Matter of Soto* (*Goldman*) (7 N. Y. 2d 397) and *Matter of Romanoff* (*Nilpw Realty Corp.*) (273 App. Div. 788) do not change the established law which affords a stranger relief from a void judgment affecting him, and they have no bearing on this case. (*Saunders v. Shaw*, 244 U. S. 317.) IV. The court's refusal to grant appellants the injunction required to implement their declared rights and carry into forceful effect the declaratory relief awarded them had the intended and inevitable effect of depriving appellants of the only effective remedy available to them to prevent the unlawful seizure of their property under a void and concededly unenforcible judgment, in violation of their constitutional rights. (*Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673; *Aberdeen Restaurant Corp. v. Gottfried*, 158 Misc. 785.) V. The judgment is not merely erroneous and voidable but absolutely void and a nullity as to appellants, and from it no rights may be derived against appellants. (*Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471; *Manhattan Star & Warehouse Co. v. Movers & Warehousemen Assn.*, 289 N. Y. 82; *Bach v. Grabfelder*, 233 App. Div. 860; *Carruthers v. Waite Min. Co.*, 306 N. Y. 136; *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Matter of Bernson Silk Mills v. Siegel & Co.*, 256 App. Div. 617; *Matter of Eagar Constr. Corp. v. Ward Foundation Corp.*, 255 App. Div. 291; *Matter of Amsterdam Dispatch v. Devery*, 254 App. Div. 233, 278 N. Y. 688; *Schafran & Finkel v. Lowenstein & Sons*, 280 N. Y. 164.) VI. The right to sue for damages —assuming appellants can establish a cause of action— is not considered in law an adequate remedy for the appropriation by one person of another's property. (*Dailey v. City of New York*, 170 App. Div. 268; *Erie R. R. Co. v. City of Buffalo*, 180 N. Y. 192; *Federal Waste Paper Corp. v. Garment Center Capitol*, 268 App. Div. 230, 294 N. Y.

714; *Green Is. Ice Co.* v. *Norton*, 105 App. Div. 331, 89 N. Y. 529; *Sage* v. *City of Brooklyn*, 89 N. Y. 189; *Craig* v. *Leitensdotfer*, 123 U. S. 189.) VII. Equitable considerations are no justification for the unlawful seizure of appellants' property in disregard of their constitutional rights. In any case appellants' good faith is unquestioned and all the equities are on their side and equity follows the law, especially the Constitution. (*Matter of Lessig*, 168 Misc. 889; *Matter of Killan*, 173 N. Y. 547; *Socony-Vacuum Oil Co.* v. *City of New York*, 247 App. Div. 163, 272 N. Y. 668.)

SAMUEL J. COHEN and HERBERT A. LEVY for respondent. I. The arbitration award was properly confirmed. *Welch* v. *Probst*, 151 App. Div. 147; *Fudickar* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. 392; *Kornbluth* v. *Flatbush Theatre*, 149 Misc. 733; *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593; *Matter of Wilkins*, 169 N. Y. 494; *Matter of Great A. & P. Tea Co.* [*Local 484*], 23 Misc. 2d 1069; *Matter of Phillips* [*American Cas. Co.*], 10 A D 2d 689; *Matter of Dembitzer* [*Gutchen*], 3 A D 2d 211, 3 N Y 2d 851; *Matter of Weiner Co.* [*Freund Co.*], 2 A D 2d 341; *Rifkin* v. *Rifkin*, 281 App. Div. 1035; *Matter of Friedheim* [*International Paper Co.*], 265 App. Div. 601; *Publishers' Assn. of New York City* v. *New York Typo. Union No. 6*, 168 Misc. 267; *Matter of Campe Corp.* [*Pacific Mills*], 275 App. Div. 634.) II. Appellants were properly excluded from that proceeding. (*Matter of Soto* [*Goldman*], 7 N. Y. 2d 397; *Matter of Romanoff* [*Nilow Realty Corp.*], 273 App. Div. 788.) III. A proceeding under section 1462 of the Civil Practice Act is the exclusive method for challenging an arbitration award. (*Donato* v. *American Locomotive Co.*, 283 App. Div. 410, 306 N. Y. 966; *Raven Elec. Co.* v. *Linzer*, 302 N. Y. 188; *American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N. Y. 322.) IV. The courts below properly denied injunctive relief to appellants on equitable grounds.

Majority Opinion of Desmond, Chief Judge.

DESMOND, Ch. J.:

In the declaratory judgment action to which the first above title applies plaintiffs have attempted to appeal on alleged constitutional grounds (Civ. Prac. Act, §588, subd. 1, par. [a]) from a unanimous Appellate Division, Second Department, affirmance of a summary judgment dismissing their suit. The second title above is of an arbitration proceeding wherein Chupka *et al.*, who are the plaintiffs in the other suit, moved unsuccessfully to vacate the award and resulting judgment in an arbitration proceeding to which Chupka *et al.*, were not parties. Lorenz-Schneider Co., Inc., which was the unsuccessful party to the arbitration, was denied leave to appeal to this court. Here, too, the appeal is taken on supposed constitutional grounds from a unanimous Appellate Division affirmance.

Stripped to essentials the question is a narrow one. In 1959 Lorenz-Schneider Co., Inc., was in the business of distributing "snack products" in the New York City area, through "route salesmen" employees, among whom were the four appellants Chupka, Freely, McNally and Schlosser. A 1959 collective bargaining agreement between Lorenz-Schneider Co., Inc., and respondent International Brotherhood, etc., Union covered the employment of route salesmen. Among other things, it prohibited the employer from making any agreement with any of its employees "inconsistent or in conflict with" the pact except that the employer might add to benefits or earnings as circumstances warranted. The employer, however, made an agreement with the four route salesmen (appellants Chupka *et al.*) by which it sold four of the routes to Chupka and the three others under conditional sales agreements with cash down payments, that agreement reciting that Chupka and the others were no

longer to be employees but thenceforth were to be independent contractors, each running one of the routes as his own separate business. The Union took the position that such sales to employees were violations of so much of the collective bargaining agreement as forbade the employer making any agreement with any employee and forbade the employer eliminating a route unless its volume of sales turned out to be uneconomic.

The collective bargaining agreement contained a broad arbitration clause and at the demand of the Union an arbitration was had between the Union and employer Lorenz-Schneider Co., Inc. The four salesmen who had bought the routes were not parties to the arbitration. The arbitrator held that the sale or attempted sale of the routes was in violation of the collective bargaining agreement and ordered Lorenz-Schneider Co., Inc., to restore the routes to the coverage of the agreement. The four salesmen-purchasers joined Lorenz-Schneider Co., Inc., in a proceeding (second above entitled) to vacate the award. Special Term and the Appellate Division held that the arbitration award was valid as to the employer and that the salesmen-purchasers were without standing in the vacatur proceedings since they were not parties to the arbitration. As above stated we, in May, 1962, denied leave to appeal in the arbitration proceeding, agreeing with the Union that the arbitrator acted within his powers in ordering the restoration of the routes, that the salesmen-purchasers were properly held to have no standing in the arbitration proceeding and that their remedy, if any, would have to be by way of a suit for damages against Lorenz-Schneider Co., Inc., which had illegally attempted to sell them the routes. This result was compelled by *Matter of Soto (Goldman)* (7 N. Y. 2d 397), a flat holding that where a union and an employer have an arbitrable controversy under such an agreement, an arbitration award may be vacated only at the instance of one

of those two parties, and not by an individual employee. The *Soto* rationale is simple and clear. Under such a collective bargaining agreemgnt the union represents all the employees as to all covered matters and each individual employee in becoming a beneficiary to the contract gives up to the union, as his representative, his individual right to sue on or litigate as to the contract.

The four salesmen-purchasers argue here, however, that they are being deprived of property rights without due process of law in that their contractual rights as route purchasers are being taken from them in litigations to which they are not parties and as to which they are refused access to the courts. There are two sufficient answers to this. First, as union-member beneficiaries of a collective bargaining agreement they have disabled themselves from asserting in the courts any right to litigate any controversy between the employer and the employees represented by the Union. Secondly—and perhaps this is another way of saying the same thing—any agreement which they attempted to make with their employer relating to the matters covered by collective bargaining was necessarily subject to the collective bargaining agreement itself.

To say that appellants ceased to be employees and came out from under the collective bargaining agreement when they quit their jobs to become route purchasers is to beg the question. The collective bargaining agreement, as correctly construed by the arbitrator, forbids such dealings by the employer.

The appeals should be dismissed, with costs, on the ground that they present no substantial constitutional question.

Dissenting Opinion of Van Voorhis, J.

VAN VOORHIS, J. (dissenting):

Appellants are distributors of food products in New York City and Long Island of Lorenz-Schneider Co., Inc., hereafter called Lorenz. They bought these distribution franchises together with certain tangible personal property from Lorenz, on conditional sale contracts, for purchase prices aggregating over $60,000. Their good faith has not been questioned, nor is it disputed that except for circumstances hereafter mentioned the contracts of purchase are valid and represent legally enforceable contracts for the sale of property under the terms of which the purchasers have taken possession. Although they were never parties to any legal action or arbitration proceeding, and have had no day in court or arbitration, they are confronted with a judgment obtained by a labor union known as Teamsters Local 802 against Lorenz, which decrees that these distribution franchises or routes be returned to Lorenz which is commanded to run such routes with its own employees. This judgment was obtained on the ground that Lorenz and Teamsters Local 802 had entered into a collective bargaining agreement preventing Lorenz from selling these route franchises, and that the transfers made to appellants severally were invalid as in violation of that contract. This appeal does not concern whether the arbitrator construed the labor contract correctly, but whether appellants were entitled to participate in the arbitration proceedings or to be heard before some other tribunal in order to assert what they claim to be their rights. That their contention is not frivolous may be discerned from reading the closely reasoned eight-page opinion of the arbitrator, in deciding in favor of the union against appellants' vendor Lorenz. They contend that the arbitrator placed a strained construction upon the labor contract and that a different result might have been reached if they had been heard to protect their interests before the arbitrator or in court. They were not

parties to any arbitration agreement or submission, received no notice that it was being conducted and did not appear therein. Later they moved to vacate the award, but the Appellate Division has held that "Not being parties to the arbitration or to the agreement upon which it was held, such individual petitioners have no standing to move to vacate the award."

Although the judgment appealed from declares that appellants "are not bound by the judgment of this court dated June 5, 1961 which directed defendant, Lorenz-Schneider Co., Inc. to restore certain bakery sales routes", so much of the complaint as sought injunctive relief was dismissed, with leave to appellants to serve an amended complaint to recover damages against Lorenz for breach of contract of sale. The net result is a declaration that appellants are legally required to surrender their property rights under their contracts of purchase from Lorenz, without having had opportunity to litigate the question in arbitration or in court, but may sue their vendor for damages. It is transparently clear that damages is an inadequate remedy. The inconsistency in the declaratory judgment from which this appeal is taken is shown by the circumstance that it declares that appellants are not bound by the judgment entered upon the arbitration award, but at the same time are obliged to surrender their delivery routes. They could not be compelled to give up what they bought under these conditional sales contracts unless they were bound by the arbitration award and the judgment entered thereon. They could not be confined to the remedy of damages unless the arbitration had binding effect upon them. Appellants assert that, right or wrong, the award and judgment could have no effect upon them unless they had opportunity to be heard to protect their legal position. They could have no right to damages unless their contracts were effectual. By the same token, if their contracts were binding they could

not be deprived of what they had obtained under them without opportunity to participate in the litigation.

Unless jurisdiction has been obtained of the person as well as the subject matter (*Ferguson* v. *Crawford*, 70 N. Y. 253), "the judgment is not due process of law and is ineffectual for any purpose." (*Matter of Battalico* v. *Knickerbocker Fireproofing Co.*, 250 App. Div. 258, 261.) Not only is a constitutional question thus clearly presented, on account of which the appeal cannot be properly dismissed, but also appellants are entitled to judgment declaring that the arbitration award and judgment have no operative effect upon them and that they are entitled to litigate in some forum whether the collective bargaining agreement precluded Lorenz from selling to them what they bought.

Except for the arbitration clause in the collective bargaining agreement, no one would question that appellants would have been indispensable parties to any action or proceeding in court to set aside these conditional sales contracts or to obtain the restoration of any property covered by them. Subdivision 1 of section 193 of the Civil Practice Act states that "A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispensable party." It is settled law that an effective determination of a controversy cannot be had when there are persons, not parties, whose rights must be determined at the same time that the rights of the parties to the action are determined (*Steinbach* v. *Prudential Ins. Co.*, 172 N. Y. 471, 478). If the judgment entered on the arbitration award is to be effectual, appellants are the parties upon whom it is to act if it is to serve its purpose. The anomaly of this situation is illustrated by the circumstance that Lorenz has been found guilty of contempt of court for not repossessing these routes and servicing them with its own employees, while appellants (who could not be proceeded against for

contempt for the reason that they were not parties) retain the books containing the names and addresses of the customers on these routes and other property which Lorenz requires if it is to do what the decree purports to require. When the arbitrator, and subsequently the court attempting to enforce the award, reached out to adjudicate the title of these appellants and directed specific performance of acts which could only be performed by them by mandating the taking of their property, they were indispensable parties to the controversy.

The foregoing may be tacitly admitted by the majority opinion, which appears to be based on the concept that appellants were represented in the arbitration proceeding by their adversary Teamsters Local 802. The conception that adversary parties can be represented by the same attorney or agent in judicial or quasi-judicial proceedings is difficult to understand. Arbitrations are quasi-judicial proceedings, and independent arbitrators are required to some extent to exercise functions and possess qualifications of judges (*Matter of Milliken Woolens [Weber Knit Sportswear]*, 11 A D 2d 166, affd. 9 N Y 2d 858; *Matter of American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 405), and, although the parties to such controversies are not required to be represented by lawyers, those who do represent them are subject to some of the responsibilities of lawyers. If a labor union represents a party to a controversy in arbitration, I am unable to understand how it can deliberately represent conflicting interests whereas if a lawyer were to do so he would be liable to disbarment. Appellants' interests in this controversy were diametrically opposed to the union, which instituted this arbitration proceeding to dispossess them of what they claimed to be their property in furtherance of the union's asserted rights. How could the union represent those whom, in effect, it was proceeding against? It is said that the union acts as agent for its members. Agency is a

fiduciary relationship (*Byrne* v. *Barrett*, 268 N. Y. 199; *Elco Shoe Mfrs.* v. *Sisk*, 260 N. Y. 100). The obligation is similar to that of a trustee, as those decisions point out citing *Meinhard* v. *Salmon* (249 N. Y. 458). "In judging the conduct of trustees," said this Court in *Matter of Hubbell* (302 N. Y. 246, 254), "the basic consideration is the fiduciary obligation which they owe to all of the beneficiaries whom they represent." The well-known language was then quoted from the *Meinhard* case that "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate." Under what rational distinction, then, can a labor union represent itself and the opposite side of the controversy in a quasi-judicial proceeding, without even notifying the opposing side that it is pending, when this would be cause for removal of any other kind of fiduciary? This Court recognized in *Matter of Soto (Goldman)* (7 N Y 2d 397) and in *Parker* v. *Borock* (5 N Y 2d 156, 161, 162) that a union is under a "fiduciary duty" to its member under such circumstances.

It is said that all of these questions are now foreclosed by *Matter of Soto (Goldman)* (7 N.Y 2d 397, *supra*). I suggest that in this difficult, complex and controversial field *Matter of Soto* does not close this controversy but opens it, and that the courts have many miles to go before it will be concluded. Basic principles of law, such as that a party to a controversy cannot represent his adversary, are not easily dislodged nor overruled.

Whatever may be the ultimate reach of *Matter of Soto (Goldman)*, *supra*, it cannot apply to the present appeal for the reason that it contradicts the basis on which the arbitrator decided this issue as between the union and Lorenz. The opinion by the arbitrator, the correctness of which on the merits is not at issue on this appeal, is clear. He left no

doubt about what he meant, nor concerning the reasons which impelled him to reach that result. He said that it made no difference to his decision whether the purchasers of these delivery routes were members of the union or third parties, saying that "there are no contractual inhibitions which do not apply with equal force to both classes of purchasers." The arbitrator thus decided the case on the theory that the purchasers of these delivery routes were to be treated in the same manner as though they were third parties and not employees of Lorenz or members of the union. The only possible manner in which the *Soto* principle could be extended to this situation would be on the theory that in some manner the arbitrator was called upon to adjudicate rights of appellants as union members, under the concept that the union had reserved the right to represent them respecting interests and obligations on their part under the collective bargaining agreement. Under neither the *Soto* nor the *Parker* cases (*supra*) nor any other principle of law did the union have any vestige of authority to represent appellants in respect of an issue that did not concern them as union members but affected them, in the language of the arbitrator, in the same manner as if they were third parties.

For these reasons it seems to me that the judgment appealed from should be reversed and the relief demanded in the complaint granted.

Judges Dye, Fuld, Froessel and Foster concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion; Judge Burke taking no part.

Appeals dismissed, with costs, upon the ground that no substantial constitutional questions are directly involved.

APPENDIX B-1.

Opinion of the New York Supreme Court, Special Term, Confirming Arbitration Award.

This is a motion to vacate an award in arbitration, on the ground that the arbitrator was guilty of misbehavior; that he had exceeded his power and exercised it so imperfectly that a mutual, final and definite award upon the subject matter submitted was never made; that he "prescribed an impossible remedy"; that he failed to answer the questions submitted to him; and that he violated constitutional due process by attempting to deprive petitioners of property without a hearing. The respondent cross-moves to confirm the award.

The corporate petitioner, referred to as the corporation, is a dealer and sales representative for five manufacturers of snack products for all the Boroughs of the City of New York and Nassau and Suffolk Counties. An essential part of that operation is the distribution of the products to customers, which is accomplished by route salesmen who are responsible for the sale and delivery of the various products and for obtaining new customers in specified areas. Most of the route salesmen were employees of the corporation. In October, 1959, the corporation entered into a collective bargaining agreement with the respondent local union for a term ending October, 1963. This agreement provided in article 17(j): "The Employer may eliminate a route if such route's volume of sales becomes uneconomic over a period of three (3) months. The employee affected by such route elimination shall continue to be employed by replacing a junior employee except if it is determined that the loss of sales is the fault of the Route Salesman in which case he shall be dismissed."

In May and August of 1960, the corporation sold to the individual petitioners, whom it had employed as route salesmen and who had been covered by the aforementioned collective bargaining agreement, their respective routes. The contracts of sale provided that the corporation "hereby

sells conditionally to the Distributor the number of independent store customers in the territory * * * as per attached schedule, established by the * * * [corporation] for the purpose of continuing the sales in said independent stores * * * the Distributor shall be deemed at all times to be an independent contractor * * *." The union protested these sales as a violation of the collective bargaining agreement and specifically of article 17(j) thereof.

The corporation and the union could not resolve the controversy, and therefore resorted to arbitration. The issue submitted by agreement to arbitration was: "Were the Company's sales of routes to William Freely, Anthony Chirpa [sic], William McNally and Charles Schlosser in violation of the contract between the parties? If so, what shall be the remedy?"

The hearings in which the union and the corporation were represented commenced in September 1960. On February 28, 1961, the arbitrator published a separate opinion and award, which stated in pertinent part: "The sales of the routes having been determined to be in violation of the parties' agreement, there must also be determined the matter of the remedy. In the arbitrator's judgment, the most reasonable remedy is a restoration of the routes to the coverage of the agreement."

The petitioners claim that the arbitrator "adjudged the rights and equities of the four independent contractors * * * without so much as giving them a hearing * * *." This conduct they characterized as "misbehavior," as "deprivation of property without due process." It usurped "jurisdiction over the four independent contractors who never consented to that jurisdiction," and clearly the arbitrator exceeded his powers. They claim that the arbitrator also exceeded his powers because he determined the matter submitted without considering that such submission was made after the time provided for in the collective bargaining agreement. They further claim that the award, which in

pertinent part provides—"These routes shall be returned to the coverage of the agreement to be served by Route Salesmen * * *."—is vague and indefinite, because it may mean that the "routes are to be returned to the coverage of the agreement in the sense that the sale of the routes must be undone" or "be handed over to the route salesmen * * * who are not the present four independent contractor routes salesmen;" or "by making the routes themselves part of the bargaining unit. Consequently, they argue that the arbitrator so imperfectly executed his power that a final and definite award upon the subject was not made.

The respondent union claims that the arbitrator's award is valid in all respects and should be confirmed, and that the four individual petitioners do not have standing to move to vacate the award.

The court is of the opinion that there was a valid submission consented to by the union and the corporate petitioner, and that the arbitrator's award was in all respects responsive to that submission (see Kraft Foods Co. *v.* Coughtry, 204 Misc. 959, aff'd 282 App. Div. 1090).

The petitioners' contention that the arbitrator exceeded his power by entertaining the submission because the time limitation for arbitration provided in the contract had elapsed, is without merit. The corporation consented to and participated in the arbitration without objection, and therefore waived the time limitation. (Matter of Staklinski [Pyramid Electric Co.] 6 App. Div. 2d 565, aff'd 6 N. Y. 2d 159).

The award cannot be considered a deprivation of the four independent petitioners' property without due process. The issue submitted for arbitration concerned the interpretation of the collective bargaining agreement between the union and the corporation. It is well established that an arbitrator can direct specific performance if it is necessary to accomplish the complete disposition of the dispute

submitted to arbitration (Staklinski v. Pyramid Electric Co., 6 N. Y. 2d 159; 5 Corpus Juris, Arbitration and Award, p. 131). The arbitrator's award requiring "restoration of the routes to the coverage of the agreement" was such a direction. In no other way could the union be made whole, in accordance with the terms of the collective bargaining agreement. The corporation cannot be allowed to perpetuate a breach it has committed under the guise of protecting alleged contractual rights of individuals to whom it transferred the routes. The arbitrator's award did not affect any recourse the four independent contractors may have against the corporation based on their contracts with it. It cannot be said, therefore, that the arbitrator was guilty of "misbehavior" because of so-called "constitutional" or "jurisdictional" dereliction (see Matter of Otis Elevator Co. [Carney], 6 N. Y. 2d 358).

As for the contention that the award is vague and uncertain, that too is without merit. Ambiguities in the award, claimed by the petitioners, simply do not exist. The corporation is to take managerial control of the routes involved, and run such routes with their own employees protected by the collective bargaining agreement. Whether these employees will be the four independent contractors or others or what rights the independent contractors have in terms of reinstatement in the union, etc., are completely irrelevant to the issues involved in the arbitration (Matter of Congregation Talmud Torah, 283 App. Div. 892). This court certainly could not upset the arbitrator's award solely because it disagrees with the arbitrator's judgment (Matter of S. W. Foods [Office Employ. Union], 8 App. Div. 2d 130, aff'd. 7 N. Y. 2d 1018). The award is unassailable no matter how disappointing it may be to the parties. (Matter of First National Oil [Arrieta], 2 Misc. 2d 225, aff'd 2 App. Div. 2d 590).

Accordingly, the motion to vacate the award is denied and the cross motion to confirm it is granted. Proceed on notice.

APPENDIX B-2.

Opinion of the New York Supreme Court, Appellate Division, Affirming Judgment, Confirming Arbitration Award.

(14 A. D. 2d 923)

Matter of Lorenz-Schneider Co., Inc., pet-ap (Internat. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802, res)—In an arbitration proceeding, the corporate petitioner and the four individual petitioners appeal: (1) from an order of the Supreme Court, Queens County, dated May 5, 1961, which: (a) granted the respondent Union's motion to confirm the arbitrator's award directing that the sales routes, transferred to the individual petitioners, Freely, Chupka, McNally and Schlosser, shall be returned to the coverage of the Collective Bargaining Agreement between the respondent Union and the corporate petitioner, Lorenz-Schneider Co., Inc., to be served by route salesmen within the scope of article 1(a) of said agreement; (b) denied petitioners' motion to vacate the award; and (c) directed said corporate petitioner to take managerial control of said routes and to run them with its own employees protected by the collective bargaining agreement; and (2) from the judgment of said court dated June 5, 1961, entered on said order. Order and judgment affirmed, with costs. The individual petitioners, former employees who purchased the routes, were not parties to the collective bargaining agreement and had not participated in the proceedings before the arbitrator. Not being parties to the arbitration or to the agreement upon which it was held, such individual petitioners have no standing to move to vacate the award (Matter of Soto (Goldman), 7 N. Y. 2d 397; Matter of Reinanoff (Nilow Realty Corp'n) 273 App. Div. 788). Hence, we do not pass upon the questions urged solely in their behalf.

APPENDIX C-1.

Opinion of the New York Supreme Court, Special Term, Dismissing Complaint in Injunction Action.

(34 Misc. 2d 123)

This is an action in which the plaintiffs seek a declaration that a certain judgment, dated June 5, 1961, entered in this court upon an award in arbitration solely between the defendants, is void and invalid as to the plaintiffs and to enjoin as against them the enforcement of such judgment. The defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802 (hereinafter called "union") moves for summary judgment. The plaintiffs cross-move for summary judgment, but in their favor. The defendant Lorenz-Schneider Co., Inc., (hereinafter called "employer") joins the plaintiffs in their motion for summary judgment. Said employer was the unsuccessful party in the proceeding which resulted in the judgment of June 5, 1961, and the union was the prevailing party.

All movants assert that only a question of law is here presented and that there are no disputed fact issues requiring a trial. To place the dispute here involved in its proper prospective a brief history of the litigation between the parties is essential.

An application was made by the defendant employer to vacate an award in arbitration in favor of the defendant union concerning the sale by the employer to the plaintiffs herein of certain bakery sales routes. The arbitrator found that such sale was in violation of a collective bargaining agreement between the union and the employer and directed the routes to be restored to the coverage of said agreement. The motion to vacate the award in arbitration was denied and the cross-motion to confirm it was granted. The resulting judgment, dated June 5, 1961, directed that " • • • the routes transferred to Petitioners, Freely, Chupka, McNally and Schlosser, shall be returned to the

coverage of the aforesaid collective bargaining agreement between the Respondent Union and the Petitioner, Lorenz-Schneider Co., Inc. * * * and that Petitioner Lorenz-Schneider Co., Inc., take managerial control of the bakery sales routes which it transferred to Petitioners * * * and that Petitioner, Lorenz-Schneider Co., Inc. run such routes with its own employees protected by the said collective bargaining agreement * * *."

Upon appeal from said judgment by the employer, in which appeal plaintiffs joined, the Appellate Division of the Second Department affirmed the judgment unanimously (14 App. Div. 2d 923, 924). The court stated, however, "The individual petitioners, former employees who purchased the routes were not parties to the collective bargaining agreement and had not participated in the proceedings before the arbitrator. Not being party to the arbitration or to the agreement upon which it was held, such individual petitioners have no standing to move to vacate the award * * *. Hence we do not pass upon the questions urged solely in their behalf."

The instant action followed. Plaintiffs moved, by order to show cause dated December 11, 1961, for an order restraining *pendente lite* the employer and the union from transferring or attempting to transfer and assuming managerial control of or otherwise interfering in any way with certain bakery sales routes of the plaintiffs herein * * *." In denying the motion Special Term stated, in pertinent part, "* * * plaintiffs have failed to meet their burden of establishing an undisputed right to so drastic a remedy * * *, particularly in view of the affirmance of the order and judgment of this court in the Appellate Division" (Chupka *v.* Lorenz Schneider Co., Inc., N. Y. L. J., January 31, 1962, p. 15, col. 6). Plaintiffs took an appeal from the order denying their aforesaid motion and moved in the Appellate Division for a stay pending appeal. In this they

failed (Chupka v. Lorenz-Schneider Co., Inc., N. Y. L. J., May 2, 1962, p. 15, col. 8).

Simultaneously with the motion for a temporary injunction the union, as the successful party in the proceeding that resulted in the judgment confirming the award sought to punish the employer for contempt of court for failure to comply with the directions in the judgment. That motion was denied because a stay had been obtained in the order to show cause by which the motion for a temporary injunction had been initiated (In re Lorenz-Schneider Co., Inc., &c., N. Y. L. J., January 31, 1962, p. 15, col. 7). Thereafter the union again moved to punish the employer for contempt, the stay contained in the order to show cause having in the meantime been vacated. That motion was granted and the employer held in contempt for its failure to comply with the judgment. It was afforded ten days of the service of a copy of the order to be entered, with notice of entry thereof, in which to comply and in the event of non-compliance it was directed that an order of commitment may issue against those officers responsible for such non-compliance, upon proof thereof and on notice (In re Lorenz-Schneider Co., Inc., &c., N. Y. L. J., March 12, 1962, p. 17, col. 2).

Plaintiffs now argue that since they were not parties to the proceedings that resulted in the judgment, dated June 5, 1961, the courts could not have adjudicated their rights to the bakery sales routes and that the enforcement of that judgment, by directing the employer to place those routes within the coverage of the collective bargaining agreement, constitutes a deprivation of plaintiffs' property rights without due process.

It is true that since the plaintiffs were not properly before the court in the proceedings which resulted in the judgment of June 5, 1961, that judgment is not *res judicata* with respect to their rights to the routes (General Aniline & Film

Corp'n *v.* Bayer Company, 305 New York 479, 483, and cases cited therein). Nevertheless, this court is constrained to hold that the equities do not warrant injunctive relief in plaintiffs' favor, the practical effect of which would not only frustrate the unanimously affirmed judgment, but nullify it. Mr. Justice Margett, in denying the motion to vacate the award and granting its confirmation (In re Lorenz-Schneider Co., Inc., &c., N. Y. L. J., April 25, 1961, p. 16, col. 5), noted: "In May and August of 1960, the corporation [employer] sold to the individual petitioners [plaintiffs], whom it had employed as route salesmen and who had been covered by the aforementioned collective bargaining agreement, their respective routes." While no claim is made that plaintiffs purchased these routes in bad faith, they were, as already noted, members of the defendant union whose collective bargaining agreement the employer violated by transferring the routes to them. In directing judgment to be entered in the union's favor, Mr. Justice Margett further stated: "In no other way could the union be made whole, in accordance with the terms of the collective bargaining agreement. The corporation [employer] cannot be allowed to perpetuate a breach it has committed under the guise of protecting alleged contractual rights of individuals [plaintiffs] to whom it transferred the routes."

To grant the plaintiffs the drastic equitable relief they seek in this action would effectively deprive the union of its remedy and permit the continuance of the breach of contract by the employer. That does not mean, however, that the plaintiffs are remediless. Again, as observed by the justice who passed upon the award: "The arbitrator's award did not affect any recourse the four independent contractors [the present plaintiffs] may have against the corporation [employer] based on their contracts with it."

Opinion of the New York Supreme Court, Special Term, Dismissing Complaint in Injunction Action.

The irreparable harm relied upon by the plaintiffs in this action as the basis for obtaining equitable relief is that "if deprived of their routes, plaintiffs may never again have the opportunity of engaging in business for themselves and will sustain great financial loss in addition not compensable by damages because of the difficulty of ascertaining and computing such damages" (complaint, par. 14). Whether plaintiffs may again have the opportunity of engaging in business for themselves is highly speculative. Damages compensable by the employer, however, can readily be ascertained inasmuch as the monetary value of the routes improperly transferred can be computed.

Plaintiffs having failed to plead any cause of action of damages and since, for the reasons noted, they are not entitled to equitable relief this court cannot, in the present state of the pleadings, grant them money damages notwithstanding that all necessary parties are before the court. As was noted in *Doyle* v. *Allstate Insurance Company* (1 N. Y. 2d 439, 442, 443): "'The award of mere compensatory damages which are almost unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment . . .'"

It follows that the plaintiffs are entitled to judgment solely to the extent of declaring that they are not bound by the judgment dated June 5, 1961. So much of the complaint that seeks injunctive relief is dismissed with leave to the plaintiffs to serve an amended complaint to recover their damages against the employer. The defendants union and employer are entitled to judgment dismissing the complaint except as the plaintiffs are entitled to a declaratory judgment as aforesaid.

Settle order.

APPENDIX C-2.

Decision of the New York Supreme Court, Appellate Division, Affirming the Judgment Dismissing Complaint in Injunction Action.

(16 A. D. 2d 938)

(New York Law Journal, June 13, 1962)

By UGHETTA, Acting P. J.; KLEINFELD, BRENNAN, HILL and HOPKINS, JJ.

Chupka, plf-ap. *v.* Lorenz-Schneider Co., Inc., def-res (Lorenz-Schneider Co., Inc., pet ap; Internat. Brotherhood of Teamsters, res)—In an action by the plaintiffs, former employees of the defendant Lorenz-Schneider Co., Inc., who had purchased certain bakery routes from said corporation, against it and against the defendant labor union for a declaratory judgment, a permanent injunction and damages; and in an arbitration proceeding between the corporation and the union relating to the status of said routes under the terms of a collective bargaining agreement, in which proceeding a judgment of the Supreme Court, Queens County, was entered on June 5, 1961, and affirmed (14 App. Div. 2d 923), the parties appeal as follows (upon a consolidated record) from three separate orders of said court: (1) Plaintiffs appeal: (a) from so much of an order made February 16, 1962, in the action, as denied their motion for a temporary injunction to restrain the defendants, acting under the judgment in the arbitration proceeding, from interfering with the management, operation or control by plaintiffs of their said routes; and (b) from an order made April 5, 1962, in the action, granting in part and denying in part both the defendant union's motion for summary judgment and the plaintiffs' cross-motion for like relief in their favor. (2) The corporation, as petitioner in the arbitration proceeding, appeals from an order made therein March 20, 1962, granting the union's motion to punish it for contempt for its alleged failure to comply with the terms of said judgment. Orders, in so far as appealed from, affirmed, without costs. No opinion.

APPENDIX D.

Section 1462, New York Civil Practice Act.

1462 *Motion to vacate award* In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators or other persons making the award exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight.

Where an award is vacated, the court, in its discretion, may direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements may be awarded to the prevailing party; and the payment thereof may be enforced in like manner as the payment of costs upon a motion in an action.

APPENDIX E.

Order and Judgment Appealed From.

Remittitur October 25, 1962.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of October in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

WITNESS,

The Hon. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR October 25, 1962.

[SAME TITLE.]

BE IT REMEMBERED, That on the 24th day of September in the year of our Lord one thousand nine hundred and sixty-two Anthony Chupka, & ors., the appellants in the action, and William Freely, & ors., the appellants in the proceeding came here unto the Court of Appeals, by Kalman I. Nulman, their attorney, and filed in the said Court Notices of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And John Strauss, as President of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802, the respondent in the action, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802, the respondent in the proceeding afterwards appeared in said Court of Appeals by Cohen & Weiss, its attorneys.

Order and Judgment Appealed From.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Kalman I. Nulman, of counsel for the appellants, and by Mr. Samuel I. Cohen, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the appeals herein be and the same hereby are dismissed, with costs, upon the ground that no substantial constitutional questions are directly involved.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said appeals be dismissed, with costs &c. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, OCTOBER 25, 1963.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

APPENDIX F-1.

Memorandum Opinion of Mr. Justice Harlan.

This application for a stay of execution of a New York judgment pending appeal to this Court is a renewal of an earlier similar application which was denied by me at a time when the litigation had not yet run its course in the state courts. That event has since occurred.

I now conclude that a stay should be granted. While I am always reluctant to interfere with the enforcement of a state court judgment except upon the strongest showing, I consider that such a showing has been made in this instance. In my opinion the balance of the equities involved on this application lies definitely with the appellants. And I cannot say that their chances of success in this Court are so remote as to overcome that factor. The appellees do not question this Court's jurisdiction to entertain the appeal. See also 28 U. S. C. § 2103.

A stay will issue as prayed for, conditioned however on the appellants perfecting their appeal and filing their Jurisdictional Statement on or before December 10, 1962.

November 30, 1962.

APPENDIX F-2.

Order of Mr. Justice Harlan Granting Stay.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

ANTHONY CHUPKA, *Et Al.*

Appellants,

vs.

LORENZ-SCHNEIDER CO., *Et Al.*

UPON CONSIDERATION of the application of counsel for the appellants, the supporting affidavit and the affidavit in opposition thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the Supreme Court of New York, County of Queens, dated June 5, 1961, and all proceedings ancillary thereto be, and they are hereby, stayed providing the appeal is perfected and the jurisdictional statement is filed on or before December 10, 1962. Should the appeal be dismissed or the judgment affirmed upon consideration of such jurisdictional papers, this stay is to terminate automatically. In the event the Court notes probable jurisdiction or postpones consideration of the jurisdiction to the hearing on the merits, this stay is to continue pending the issuance of the mandate of this Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

Dated this 30th day of November, 1962.

Office-Supreme Court, U.S.
FILED
JAN 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 650

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,
Appellants,

against

LORENZ SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,
Appellees.

In the Matter of the Arbitration

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,
Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ-SCHNEIDER CO. INC.,
Appellees.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Samuel J. Cohen,
Attorney for Appellee Local 802,
50 East 42nd Street,
New York 17, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1962

No.

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

against

LORENZ-SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,

Appellees.

In the Matter of the Arbitration

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ-SCHNEIDER CO. INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves: (a) to dismiss the appeal herein on the ground that a substantial federal question is not presented and that the judgment appealed from rests on an adequate non-federal basis, or, in the alternative, (b) to affirm the final judgment of the Court of Appeals of New York State on the ground that the question presented is so unsubstantial as not to need further argument.

Statement

Lorenz-Schneider Co., Inc. (the "Employer") and Local 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") are parties to a collective bargaining agreement executed on October 5, 1959, for a term of four years ending October 4, 1963 (650)*. This agreement governs the wages, hours and working conditions of route salesmen employed by the Employer (602). These employees are engaged in the distribution to retail storekeepers of products merchandised by the Employer, including potato chips and similar snack items (676).

The subject matter of the collective bargaining agreement is the sales routes operated by these route salesmen. Indeed, a route is a job under the agreement (597).

Commencing in May, 1960, the Employer wrongfully eliminated four of the jobs covered by the collective bargaining agreement by purporting to transfer four sales routes to four individuals as independent entrepreneurs. These four individuals had, until that time, been Union members employed by the Employer as route salesmen under the collective bargaining agreement between the Employer and the Union (678). These four individuals, Chupka, Freely, McNally and Schlosser by name, are the appellants herein ("Individuals").

The collective bargaining agreement contains an undertaking by the Employer that "he will not enter into any agreement with any employee, verbally or in writing, which may be inconsistent or in conflict with this agreement * * *" (644). The agreement provides that a route may be eliminated only if it is shown that the volume of sales on the route has become uneconomic over a period of three

* Numbers in parentheses refer to folios of the printed record on appeal, unless otherwise indicated.

months (648). Neither the Employer nor the individuals claimed that the four routes in question had become uneconomic prior to the challenged transaction. (579, 596).

The Employer disposed of these four jobs by means of agreements of conditional sale which it executed with each of the Individuals (351, 395, 437, 485). No provision of these agreements purports to convey an exclusive right to sell to specified customers, or in a specified territory. Actually transferred by these agreements of conditional sale was the job of delivery of the Employer's product to a fixed number of storekeepers in a given territory (351, 395, 437, 485). The four agreements of conditional sale are substantially identical. They provide that the Individuals may sell to storekeepers only the products furnished by the Employer (352, 396, 438, 485). Under these agreements, the Individuals are required to service each of these customers at least twice a week (354, 398, 441, 488). Display racks and stands are to be sold to the Individuals by the Employer (358, 402, 445, 492). The Individuals must purchase all stock from the Employer, and they may sell to each customer only those items authorized for sale by the Employer (355, 399, 441, 489). By entering into these agreements the Individuals have agreed to abide by an undisclosed set of rules and regulations promulgated by the Employer to govern the details of the work performed. They must observe these rules and regulations which, according to express provision of the contract, survive the closing (356, 400, 443, 490).

Each of the Individuals must, pursuant to these conditional sales agreements, place their names on trucks and on sales tickets where designated by the Employer (357, 402, 444, 491). Furthermore, each agreement expressly provides that in the event that the Employer recoups these routes, current rates for repurchase will apply (359, 403, 446, 493).

Finally, no title to these jobs or sales routes has yet vested in Chupka, Freely, McNally or Schlosser, and title will not vest in them until May, 1967, or, in Freely's case, September 1964 (361, 405, 449, 495) and then only if the specified installments have been paid.

Thus, the tasks which were formerly done by the four Individuals as employees are still being performed by them. The only major change is that they now perform the work not as employees governed by the collective bargaining agreement, but rather as parties to individual conditional sales agreements with the Employer. The merchandise is the same, the customers are the same, and the Individuals are the same (584).

Shortly after these transfers took place, the Union advised the Employer of its objections, on the grounds that the transfer of jobs or sales routes under such circumstances was prohibited by the collective bargaining agreement. Unable to resolve this matter amicably, the parties followed the grievance procedures set forth in the collective bargaining agreement and ultimately proceeded to arbitration (679). The Employer and the Union agreed upon (1) the selection of an arbitrator, and (2) the issue to be submitted to the arbitrator for decision (503). Protracted arbitration hearings followed on several dates, with both parties represented by counsel (679). The Individuals were not parties to the arbitration proceedings.

The Employer and the Union jointly framed the issue for the arbitrator (503). The issue submitted for arbitration was:

> "Were the Company's sales of routes, to William Freely, Anthony Chupka, William McNally and Charles Schlosser in violation of the contract between the parties? If so, what shall be the remedy?" (503).

The arbitrator issued his award on February 28, 1961 (680). In his award, he responded to the submission by finding that the transfer of these jobs or sales routes by the Employer to the Individuals did, in fact, violate the collective bargaining agreement. As the remedy, he directed the restoration of these routes to the coverage of the collective bargaining agreement from which they had been wrongfully removed. The arbitrator's award states:

> "The Company's sales of routes to William Freely, Anthony Chupka, William McNally and Charles Schlosser were in violation of the agreement between the parties. These routes shall be returned to the coverage of the agreement to be served by route salesmen, within the scope of Article 1(A) of the parties' agreement." (571-73).

The collective bargaining agreement provides that an arbitrator's award shall be final and binding upon the Employer and the Union (636).

Following the issuance of this award, the litigation which has led to the appeals now before this Court was commenced.

For ease of reference, it is necessary to distinguish between the two cases which are the subject of this appeal. The case captioned

> "In the Matter of the Arbitration
>
> Between
>
> Lorenz-Schneider Co., Inc. and William Freely, Anthony Chupka, William McNally, and Charles Schlosser,
>
> Petitioners,
>
> and
>
> International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802,
>
> Respondent."

is a special proceeding brought pursuant to Section 1462 of the Civil Practice Act of the State of New York by the

Employer and the Individuals, seeking an order vacating the arbitrator's award. In this special proceeding, the Union cross-moved for an order and judgment confirming the arbitrator's award. This special proceeding shall henceforth be referred to as the "Arbitration Proceeding".

Following a decision by the Appellate Division of the Supreme Court of the State of New York, Second Department, holding that the Individuals had no standing to apply for the relief sought in the Arbitration Proceeding, the Individuals commenced a new and separate action in the Supreme Court of the State of New York for an injunction and declaratory judgment. In the latter action, both the Employer and the Union were party defendants.* By this action, the Individuals sought a judgment declaring that the arbitration award and the judgment confirming it were not binding upon them, and restraining the Employer and the Union from (1) enforcing the award and judgment against the Individuals, and (2) interfering with the operation of these jobs or sales routes by these Individuals. This action is captioned

"Anthony Chupka, William Freely, William McNally and Charles Schlosser,

Plaintiffs,

against

Lorenz Schneider Co., Inc., and John Strauss, as President of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802,

Defendants."

and will hereinafter be referred to as the "Injunction Action". Each of the foregoing matters will be considered in greater detail below.

* In the Injunction Action, the defendant Employer fully supported the position of the plaintiff Individuals, and indeed joined with them in several applications for various relief against the defendant Union. (33, 209-13).

The Arbitration Proceeding

By notice of motion dated March 16, 1961, the Employer and the Individuals jointly commenced the Arbitration Proceeding by moving the Supreme Court of the State of New York, Queens County for an order vacating the award of the arbitrator (675). That relief was denied, and the Union's cross-motion for an order confirming the award and for judgment thereupon was granted (675). A judgment confirming the arbitration award and incorporating the arbitrator's mandate of specific performance was entered on June 5, 1961 (717).* The text of this judgment is found in the printed record at folios 310-15.

The Employer and the Individuals jointly appealed from this decision to the Appellate Division of the Supreme Court, Second Department. By order dated November 27, 1961, that Court unanimously affirmed (715-17). The Appellate Division also determined that the Individuals had no standing to move to vacate the arbitrator's award since they were not parties to the collective bargaining agreement or to the arbitration (717). In its opinion, the Appellate Division declared that it was not passing upon the points urged solely on behalf of the Individuals (717).

From the adverse decision of the Appellate Division, the Employer applied to the Court of Appeals of the State of New York for leave to appeal to that Court. Leave to appeal was denied on May 17, 1962 (828). The Individuals

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* The Employer's violations of its agreement with the Union began in the Spring of 1960 (678). To date, although every tribunal which has ruled upon the matter has found in the Union's favor, enforcement of the judgment confirming the arbitrator's award has been impossible because of a succession of interlocutory stays secured by the Employer and/or the Individuals. Since the collective bargaining agreement expires on October 4, 1963, the Union will be wholly denied the benefit of an ultimate decision in its favor if the Individuals and the Employer succeed in delaying enforcement of the judgment beyond that date.

appealed directly to the Court of Appeals thereafter, and their appeal was dismissed upon the Union's motion, on the ground that no substantial constitutional question was presented (808). Following the dismissal of their appeal by the Court of Appeals, the Individuals appealed directly to this Court.

The Injunction Action

By complaint and order to show cause dated December 11, 1961 (shortly after the Appellate Division, had, on November 27, 1961, determined that the Individuals had no standing to move to vacate the award) the Individuals commenced the Injunction Action against the Employer and the Union, asking for a judgment (1) declaring that the arbitration award and the judgment confirming it were void as to them and (2) enjoining the Employer and the Union from enforcing the award against them and from interfering with their operation of the jobs or sales routes (109-10). Following the denial by the Supreme Court of a motion by the Individuals for a temporary injunction (22-29), that Court partially granted the Union's motion for summary judgment by dismissing the complaint insofar as it sought injunctive relief, while at the same time granting judgment to the Individuals to the extent of declaring that they were not personally bound by the judgment issued in the Arbitration Proceeding. In the exercise of its discretion, the Court held that the equities did not warrant the granting of injunctive relief in favor of the Individuals because the effect of such relief would be to nullify the judgment rendered in favor of the Union, and would permit the Employer to continue in the breach of its contract with the Union (269, 272). The Court held, however, that the Individuals were not without an adequate remedy in the form of an action for damages against the Employer. Leave to bring suit for damages was granted (273-75).

The Individuals appealed to the Appellate Division of the State of New York, Second Department, from both the order denying a temporary injunction and the order dismissing their complaint for permanent injunctive relief. On June 11, 1962, the Appellate Division unanimously affirmed each of the orders appealed from, without opinion (718-20). An appeal taken directly by the Individuals to the Court of Appeals of the State of New York from the foregoing determination by the Appellate Division was dismissed by that Court on October 25, 1962, upon the sented (808). Following the dismissal of that appeal, the Individuals appealed directly to this Court.

ARGUMENT

POINT I

The appeal in the arbitration case presents no substantial federal question.

A. No substantial federal question is raised by the absence of the Individuals from the proceedings before the arbitrator.

No federal question is raised by the absence of the Individuals from the arbitration proceeding itself. The arbitration was held pursuant to the provision in the contract between the Union and the Employer under which only controversies between the parties to the agreement are arbitrable (636). The Union and the Employer submitted to arbitration a dispute between them concerning the interpretation of their contract (578). The Individuals were not parties to the agreement, and any dispute which they may have had with either party to the agreement was independent of and not arbitrable under that agreement. Grievances of the Individuals are justiciable elsewhere than in a contractual arbitration proceeding between the Employer and the Union. This Court has said that:

> "• • • arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582.)

The arbitration provisions of the agreement certainly do not make controversies with strangers arbitrable thereunder. Nor can it be said that a stranger has a constitutional right to be heard on the interpretation of a contract between the two contracting parties, before a tribunal established by the contracting parties for their own business purposes. In the *Warrior* case, *supra*, this Court, quoting with approval from *Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016, stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." (363 U. S. at 581.)

This is not to say that the stranger is without a remedy for the infringement of such rights as he may possess. There remains available to him in an appropriate case a judicial remedy for such infringement.

A stranger's right to be heard on the issue of the remedy to be awarded by the arbitrator is no greater than his right to be heard with respect to the interpretation of the parties' agreement. The formulation of a remedy is no less within the exclusive realm of the arbitrator than the interpretation of the contract itself. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597, Mr. Justice Douglas stated for the majority of this Court:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."

The issue jointly submitted by the parties to the arbitrator required him to determine whether the collective bargaining agreement was violated by the Employer's removal of four route salesmen's jobs from its coverage, and, if so, what remedy should be awarded. The arbitrator found that the Employer had indeed violated the agreement. As a remedy, the award directed the restoration of these four jobs to the coverage of the agreement. No remedy, it is submitted, could be more appropriate under the circumstances. No federal question is raised by a stranger's assertion of the right to be heard on the remedy to be awarded in a contractual arbitration proceeding as between the two contracting parties.

The individuals had no right, federal or otherwise, to be heard by the arbitrator. To the extent that they had assumed the status of independent businessmen as of the time the arbitration hearings were held, they were plainly beyond the coverage of the arbitration provisions of the agreement. To the extent that they might have wished, at that time, to continue to be treated as members of the Union, they were bound by the conduct of the arbitration by the Union as their duly designated collective bargaining representative. To the extent that they might have wished at that time to be heard to argue that they were innocent victims of the Employer's wrongdoing and should not be made to suffer as a result, they admittedly remained free, as the Courts below have repeatedly acknowledged, to assert a claim for damages against the Employer.

In any event, under no body of law does a stranger's claim that he is an innocent victim of the violation of a contract to which he is not a party require the injured party to the contract to surrender his contractual remedy of arbitration. While the good faith and innocence of the Individuals is open to serious doubt,* these considerations were in fact irrelevant to the arbitration proceedings. Strangers are properly denied the right to intervene as parties to labor arbitration cases, especially where such intervention would frustrate the objectives intended to be accomplished by the agreement to arbitrate.

B. No substantial federal question is raised by the absence of the Individuals from the judicial proceedings in which the vacatur of the arbitration award was sought.

In *Matter of Soto*, 7 N. Y. 2d 397, 399, 165 N. E. 2d 855, the highest court of the State of New York held that discharged employees had no standing to move to vacate an award upholding their discharge, which was rendered in an arbitration proceeding between their employer and their union. The Court stated:

> "The award, having been rendered in a controversy between the parties to a valid collective agreement, could be vacated only at the initiation of a party to the arbitration in the manner and for the reasons provided by section 1462 of the Civil Practice Act."

It was the *Soto* principle which was applied by the Courts of the State of New York when they rejected the arguments of the Individuals in the instant case.

No substantial federal question is raised by the Individuals' claim that the Courts of the State of New York

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* Godfrey P. Schmidt, Esq., attorney for the Employer, also represented the Individuals in their application for an order vacating the arbitration award (500). Thereafter, representation of the Individuals was transferred to Kalman I. Nulman, Esq., an attorney with whom Mr. Schmidt shares his offices (20, 21).

erred in denying to them standing to vacate the arbitrator's award.* This is true for essentially the same reasons that they were not entitled to be joined in the arbitration proceeding itself.

In Court, the Individuals might wish to argue that the arbitrator erred in interpreting the agreement as he did, or that he awarded the wrong remedy. But such considerations are not appropriately argued to a court. In this respect, Section 1462 of the Civil Practice Act, as well as the decisions of this Court and of the New York Court of Appeals forbid reviewing courts to substitute their judgment on the merits, or concerning the remedy awarded, for that of the arbitrator.

> *United Steelworkers of America* v. *Enterprise Wheel & Car Co.*, 363 U. S. 593, 596;
> *Matter of Wilkins*, 169 N. Y. 494, 496, 62 N. E. 575;
> *Dembitzer* v. *Gutchen*, 3 N. Y. 2d 851, 144 N. E. 2d 728.

If it is the claim of the Individuals that their constitutional rights are infringed by the application to them of the principle that Courts may not review the arbitrator's exercise of judgment, then important principles governing labor arbitration recently announced by this Court demonstrate the lack of merit in such a claim. This Court, in the *Enterprise Wheel* case, *supra*, stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (363 U. S. at 596.)

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* Indeed, the Individuals were parties to and were in fact fully heard in the proceeding in which the judgment confirming the award was entered. It was not until the decision on appeal that they were found to have no standing to move to vacate the award.

If the Individuals are here claiming that substantial federal rights were violated insofar as the decisions below hold that they had no right to show, in the statutory proceeding to vacate the award, that they were innocent injured parties, or that they were improperly excluded from the arbitration itself, such claims are equally without merit. Such claims could succeed only if the Individuals could establish independently that their innocence or their asserted rights entitle them to joinder as parties to the arbitration proceeding itself. As shown above, however, the contractually private nature of the arbitration between Employer and Union, together with the irrelevance of the innocence or guilt of the Individuals as considerations for the arbitrator, required the New York Courts to reject their attempt to join in the motion to vacate.

Finally, if the Individuals claim a substantial federal right to argue in Court that the award in an arbitration to which they were not parties should be set aside as invalid for the reasons listed in Section 1462 of the Civil Practice Act,* that claim must also fail. The Employer has, in the

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* Section 1462 of the Civil Practice Act of the State of New York provides:

"Motion to vacate award. In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated.

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators, or other persons making the award exceeded their powers, or so imperfectly executed them, that a

instant case, proceeded through the courts of New York, up to and including the Court of Appeals, upon his claim that the arbitration award is invalid under Section 1462. Every court to which the Employer has applied has rejected this contention on its merits. Must the Courts hear the same challenge again, and from a stranger who supposes himself damaged by the award, but who is neither a party to the collective bargaining agreement, the arbitration proceeding, nor the dispute over contract interpretation? Must the State Courts, as a matter of substantial federal rights, hear attacks by strangers upon arbitration awards which resolve private business controversies? May strangers attack an award which satisfies the parties to the arbitration? Is any limit to be placed upon the number of strangers who may attack the award?

Obviously, chaos would be introduced into collective bargaining unless arbitration is preserved as a speedy and effective method of finally resolving controversies between parties to a collective bargaining agreement. And the exclusion of strangers from such controversies is grounded

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mutual, final and definite award upon the subject-matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight.

Where an award is vacated, the court, in its discretion, may direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements may be awarded to the prevailing party; and the payment thereof may be enforced in like manner as the payment of costs upon a motion in an action."

upon the desire to preserve the efficacy of this salutary procedure, and upon the recognition that strangers may, in court, exact a judicial remedy for any violation of their rights.

None of the claims which the Individuals sought to assert in the proceeding to vacate the award were justiciable in such a proceeding. No other claims have been advanced by the Individuals in support of the substantial federal right which they assert on the first of these two appeals. They have thus established no right, federal or otherwise, sufficient to justify an appeal to this Court.

POINT II

The appeal in the injunction case presents no substantial federal question.

A. No substantial federal question is raised by the decisions of the New York State Courts holding that the Individuals are not entitled to an injunction restraining the enforcement of the judgment confirming the arbitration award.

The action to restrain the enforcement of the judgment confirming the arbitration award is, on its face, a collateral attack upon the validity of that judgment by persons in privity of contract with a party to the proceedings in which the judgment was rendered.

The judgment confirming the arbitration award was affirmed by the Appellate Division (715-17). The Court of Appeals, upon two separate occasions, has refused to review the decision of the Appellate Division (823, 828). Under these circumstances, the judgment confirming the award is not susceptible to collateral attack either by the parties to the action in which it was rendered, or by other interested persons who were not parties.

Bryan v. Kennett, 113 U. S. 179, 198;
In re Lennon, 166 U. S. 548, 553;
Johnson v. Muelberger, 340 U. S. 581;
Conkey v. Russell, 111 Fed. 417, 421.

See also

Donato v. American Locomotive Co., 283 App. Div. 410, 127 N. Y. S. 2d 709, affirmed 306 N. Y. 966, 120 N. E. 2d 227;
Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755;
Martocello v. Martocello, 197 Ga. 629, 30 S. E. 2d 108;
Brokaw v. Brokaw, 99 Ind. App. 385, 192 N. E. 728;
Suiter v. Suiter, 77 Ohio App. 44, 57 N. E. 2d 616.

In *Donato v. American Locomotive Co., supra*, the Court observed that

> "If every person who had interest in an arbitration proceeding to which he was not a party had the right to attack it by a plenary suit in equity, the situation would be a chaotic one." (127 N. Y. S. 2d at 713).

B. No substantial federal question is raised by the decisions of the New York State Courts holding that the Individuals' rights can be fully preserved by an action for damages against the Employer.

The Individuals argue that a substantial federal question is raised by that portion of the decision below which states:

> "To grant the plaintiffs the drastic equitable relief they seek in this action would effectively deprive the union of its remedy and permit the continuance of the breach of contract by the employer. That does not mean, however, that the plaintiffs are remediless. Again, as observed by the justice who passed upon the award: 'The arbitrator's award did not affect any recourse the four independent contractors [the present plaintiffs] may have against the corporation [employer] based on their contracts with it.'
>
> "The irreparable harm relied upon by the plaintiffs in this action as the basis for obtaining equitable relief is that 'if deprived of their routes, plaintiffs may never again have the opportunity of engaging

in business for themselves and will sustain great financial loss in addition not compensable by damages because of the difficulty of ascertaining and computing such damages' (complaint, par. 14). Whether plaintiffs may again have the opportunity of engaging in business for themselves is highly speculative. Damages compensable by the employer, however, can readily be ascertained inasmuch as the monetary value of the routes improperly transferred can be computed.

"Plaintiffs having failed to plead any cause of action of damages and since, for the reasons noted, they are not entitled to equitable relief this court cannot, in the present state of the pleadings, grant them money damages notwithstanding that all necessary parties are before the court. * * *" (272-275)

Since the arbitrator's judgment on the issue submitted is not judicially reviewable, it is established that the Union has suffered injury as a result of the Employer's wrongdoing. Even if it is assumed *arguendo* that the Individuals have also been wronged by the Employer, and may be damaged by the manner in which the Employer elects to satisfy its duty to comply with the award, the court below properly limited the Individuals to their damage remedy against the Employer. Such a judicial limitation raises no substantial federal question.

Obviously, two parties successively wronged by a single wrongdoer cannot each obtain specific performance. In the presence of such conflicting claims for specific performance, courts apply the equitable maxim that the claim prior in time is superior in right.

Louisiana v. *Mississippi*, 202 U. S. 1;
Commercial National Bank v. *Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520;
Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U. S. 182;
Niles v. *Mathusa*, 162 N. Y. 546, 57 N. E. 184;

Central Trust Co. of New York v. *West India Imp. Co.*, 169 N. Y. 314, 323, 62 N. E. 387, 390;
Bispham's *Principles of Equity*, § 45 (8th ed. 1908).
Pomeroy's Equity Jurisprudence, §§ 413-15 (5th ed. 1941);
19 Am. Jur. *Equity*, § 486 (1938);
30 C. J. S. *Equity*, § 111 (1950);

Application of this principle to the Individuals' claims in this case is especially appropriate. Any separate agreements made by them with the Employer concerning route salesmen's jobs were necessarily subject and subordinate to the collective bargaining agreement itself. Transferees such as the Individuals normally take property subject to rights which obtained while the subject matter was in the hands of the transferor (Restatement, Judgments, § 115, note 1(d) (1938)). The Individuals, all formerly employees working under the collective agreement and aware of its terms, made their separate arrangements with the Employer concerning the subject matter of the collective agreement at their peril. The Individuals made their individual agreements with at least constructive notice that such arrangements transgressed the collective agreement.

The Individuals are not deserving of specific performance as a matter of basic equitable principles. A fixed dollar price was agreed upon as the price for the property which they claim to have purchased from the Employer. (360, 404, 448, 495). If such property had an ascertainable market value in dollars at the time the transactions occurred, the value of such property together with any subsequent accretions is necessarily susceptible of computation by the same means now. As the Court below found,

> "Damages compensable by the employer, however, can readily be ascertained inasmuch as the monetary value of the routes improperly transferred can be computed." (274).

The grant or denial of equitable remedies such as an injunction or a decree of specific performance, far from presenting a substantial federal question, has always been recognized as a matter within the sound discretion of the trial court.

> "Equity is rooted in conscience. An injunction is, as it always has been, 'an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion.'" *Hurd* v. *Hodge*, 334 U. S. 24, (1948) (concurring opinion of Frankfurter, J.) See also *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334 (1933) (Brandeis, J.)

The discretion of a court of equity traditionally is not exercised to provide equitable relief where, as in the instant case, the legal remedy of damages is adequate. *Harrisonville* v. *Dickey Clay Co., supra;* Pomeroy's *Equity Jurisprudence*, §1338 (5 ed., 1941); *cf. White* v. *Sparkill Realty Co.*, 280 U. S. 500 (1930).

The exercise of discretion by a Court on the basis of its examination of the equities of the respective parties does not raise a federal question. The Court of Appeals of the State of New York, following its examination of the facts, dismissed both of these appeals upon the ground that no substantial constitutional question is involved. This Court should do the same.

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeals herein on the ground that a substantial federal question is not presented and that the judgment appealed from rests on an adequate non-federal basis, or, in the alternative, should affirm the final judgment of the Court of Appeals of New York State on the ground that the question presented is so insubstantial as not to need further argument.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Appellee Local 802.

Of Counsel:
SAMUEL J. COHEN,
HERBERT A. LEVY,
BRUCE H. SIMON.

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No. 650.

IN THE

Supreme Court of the United States

OCTOBER, 1962 TERM.

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

against

LORENZ-SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,

Appellees.

IN THE MATTER OF THE ARBITRATION

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,

Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ-SCHNEIDER CO. INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

KALMAN I. NULMAN,
Attorney for Appellants,
60 East 42nd Street,
New York 17, N. Y.

January 28, 1963.

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Foreword.

Appellants' Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the questions

presented, and includes the opinions below and the statute involved.

A motion to dismiss or in the alternative to affirm the judgments appealed from has been filed by appellee Union.

Appellants contend that the questions raised by this appeal are substantial and of general public importance and merit full consideration by this Court and that the judgments of the New York Supreme Court should be reversed.

The descriptive terms, abbreviations and folio references used in the Jurisdictional Statement are used here.

Argument.

(a) Appellee's statement is not in accord with the record facts.

We regret to have to say that we are unable to accept appellee's statement of the facts as correct.

Appellee states (p. 8) the court below held that appellants were not without an adequate remedy. There was no such holding by any court. The majority of the Court of Appeals (the "State Court") in discussing appellants' supposed right to sue for damages states: "* * * [appellants'] remedy, *if any*, would have to be by way of a suit for damages * * *" (A-7, italics supplied).

Throughout its brief appellee uses language suggesting the existence of fact issues in this case and doubt as to whether the routes were actually sold to appellants, their good faith in purchasing the same and the *bona fides* of the sale transactions. There are no fact issues involved and there was never any issue as to any of these matters. In the arbitration, to which appellants were not parties, there was, as appellee conceded below, only one single issue. "[The] sole issue before the arbitrator was a question of

[contract] interpretation between the Employer and the Union" (p. 16, appellee's brief in the Court of Appeals; 664). In appellants' proceeding and action—with which this appeal is concerned—only legal issues are involved. "All movants [including appellee Union] assert that only a question of law is here presented and that there are no disputed fact issues requiring a trial." (C-1); "while no claim is made that [appellants] purchased these routes in bad faith * * *" (C-4). It is therefore clear that no fact issues are involved in this appeal.

At page 2, appellee quotes only part of a clause from the labor contract. The balance of that clause is found in footnote 4, page 10 of the Jurisdictional Statement. The quoted clause was not, as appellee suggests, the basis for the arbitrator's decision. To the contrary, the arbitrator was of the opinion that such clause authorized Company to sell its routes to *employees*, but he held, in conformity with appellee's contention, that such authorization was inapplicable to appellants because, although they were employees at the time, they ceased *eo instante* the sale transactions were concluded[1] to be employee's; hence appellants "* * * are *not* covered by the language of 17(a) any more than by any other language of the agreement" (594).

Other errors occur in appellee's statement. We consider it unnecessary to burden the Court with any further discussion on the subject. We shall rely instead upon the contrary assertions in appellants' statement of facts, the correctness of which appellee does not question.

(b) This Court's jurisdiction to entertain the appeal is not questioned.

Appellee does not challenge appellants' right to proceed by appeal nor the stated basis therefor. There is

[1] By such reasoning a man can never be said to have married a single woman.

therefore no question of this Court's jurisdiction to entertain the appeal.

(c) Appellee does not defend the holding of the State Court.

Significantly, appellee makes no effort to defend the basis upon which the State Court dismissed appellants' appeals. Appellee's brief does not even make a reference thereto. Obviously appellee recognizes that this ground—never urged by appellee and suggested for the first time by the State Court upon the argument—is indefensible.

The State Court relied upon its own decision in *Soto* as authority for its position. In that case arbitration was had on the issue of an employer's right to discharge its employees for conduct violative of the collective bargaining conditions, a deliberate slowdown. The employees were given notice of the arbitration and attended thereat with counsel of their own choosing to represent them. Upon the union's objection that it had the sole right to conduct the arbitration in behalf of the affected employees, the arbitrator adjourned the hearing. Prior to the adjourned date, the arbitrator notified the affected employees of his decision to permit the union, and not their own counsel, to represent them. As a result, the employees declined to attend the hearings although they were given time off by the employer for that purpose. After a determination adverse to them the affected employees sought and were denied leave to vacate the award. On appeal the Appellate Division reversed; that court was in turn reversed by the Court of Appeals. No constitutional questions were raised in that case. The rationale of *Soto*, as explained in the majority opinion of the State Court in this case, is that under a collective bargaining agreement the union represents all covered matters and each individual

employee in becoming a beneficiary of the contract gives up to the union, as his representative; his individual right to sue on or litigate as to the contract (A-8).

Apart from other fundamental differences between the two cases, appellee union in the case at bar, never, for obvious reasons, assumed to act as agent for appellants. On the contrary, appellee expressly disavowed agency and succeeded at arbitration on the contention that appellants were no longer members of the bargaining unit it represented and hence the Company could not avail itself of the clause of the labor contract which authorized the sale of routes to *employees*.

As appellants point out in their Jurisdictional Statement (pp. 26-27) it is for these reasons that appellee's experienced labor counsel never contended and do not now contend that appellee acted as agent for appellants at arbitration.

Absent such contention by appellee there is no doubt that the *Soto* holding is inapplicable and that the State Court decision is left without a valid basis to rest upon.

(d) Appellee's abandonment of its principal contentions in the state courts leaves the judgments appealed from without support.

Appellee has conceded that the arbitrator and the court implementing the award lacked jurisdiction to adjudicate as to or to affect the rights or property of appellants and that the Judgment is not binding upon or enforceable against appellants. Appellee has acknowledged that no citation of cases is necessary to emphasize the "sanctity of [the] principle * * * that every person is entitled to a 'day in court' before his rights may be affected" (26) but has heretofore argued that: (i) none of appellants' rights were adjudicated by the award or the Judgment;

and (ii) the award does not affect appellants' property (197); hence appellants had no ground for attacking the Judgment.

Appellee appears to have abandoned these contentions. Appellee's remaining contention—the transparently frivolous contention that appellants' efforts to restrain the enforcement against them of this void judgment, taken in flagrant disregard of their constitutional rights, constitute an impermissable collateral attack upon the judgment—and appellee's equally frivolous contentions that this appeal should be dismissed or affirmed, discussed *infra*, are all that appellee offers to support the judgments on appeal. These contentions, as we show, are wholly lacking in merit.

Contrary to appellee's contention (p. 16) the taking of proceedings in the action in which a judgment is rendered (to have the judgment vacated or reversed or modified, as was done by appellants in the arbitration proceeding, by appropriate proceedings in the trial or appellate court) is a direct, and not collateral, attack upon the judgment. *Restatement, Judgments*, §11.

So also, the taking of independent proceedings in equity to prevent the enforcement of the judgment (as was done by appellants in the action) is a "direct attack". *Restatement, Judgments*, §11.

So far as appellants are concerned the question of whether this is a direct or collateral attack is immaterial, for a void judgment may be called into question at any time by either a direct or collateral attack. *Matter of Doeg* v. *Howland Co.*, 224 N. Y. 30, 38; *Matter of Killian*, 172 N. Y. 547, 553; *Freeman, Law of Judgments*, 5th Ed. §334, §1202, p. 2497; 1 *Black on Judgments*, §260; *Restatement, Judgments*, §11F, §112, §117, *et seq.* It is therefore clear there is no merit whatever to appellee's remaining contention.

Appellee's failure to defend the State Court decision and the abandonment of appellee's own principal grounds of defense leaves the judgments on appeal without valid support.

(e) Appellee's brief fails to respond to or refute appellants' contentions.

Appellee does not address itself to or refute a single contention in appellants' Jurisdictional Statement. Nor does appellee question the applicability of or challenge any of the authorities cited in appellants' brief; of the forty-five cases and two authorities cited by us, appellee mentions only two, *Soto* and *Donato* v. *American Locomotive Co.*, 283 App. Div. 410, 127 N. Y. S. 2d 709, affirmed 306 N. Y. 96, 129 N. E. 2d 227; appellee fails to discuss or mention a single one of the cited cases decided by this Court.

Obviously, if appellants' contentions are correct, appellee is not entitled to a dismissal of this appeal. Appellee nevertheless seeks such dismissal without making the slightest effort to refute appellants' contentions. Instead, as we show in the next subdivision, appellee demolishes straw men.

(f) Appellee's motion to dismiss or affirm is addressed to phantom issues of its own manufacture.

Appellee's argument (pp. 9-20) avoids the issues of this case and addresses itself to phantom issues of its own manufacture. Although appellants' Jurisdictional Statement spells out appellants' contentions under the headings "The question presented by the appeal" (pp. 6-8), and "The federal questions are substantial" (pp. 26-28) precisely and in detail, appellee's argument is replete with such expressions as: "[appellants] might wish to argue * * *" (p. 13); "If it is the claim of [appellants]

* * *" (p. 13); "If [appellants] are here claiming * * *" (p. 14); and "* * * if [appellants] claim * * *" (p. 14).

In that fashion appellee avoids the real issues and introduces the straw men which it seeks to demolish. Except to divert attention from the true issues, we know of no purpose to be served by burdening the Court with an analysis of appellee's shadow boxing antics. We shall rely, instead, upon the Jurisdictional Statement which fully describes the issues involved and appellants' contentions.

Conclusion.

Appellants respectfully submit that the motion to dismiss or affirm should be denied and the case heard on briefs and oral argument.

New York City, January 28, 1963.

Respectfully submitted,

KALMAN I. NULMAN,
Attorney for Appellants.